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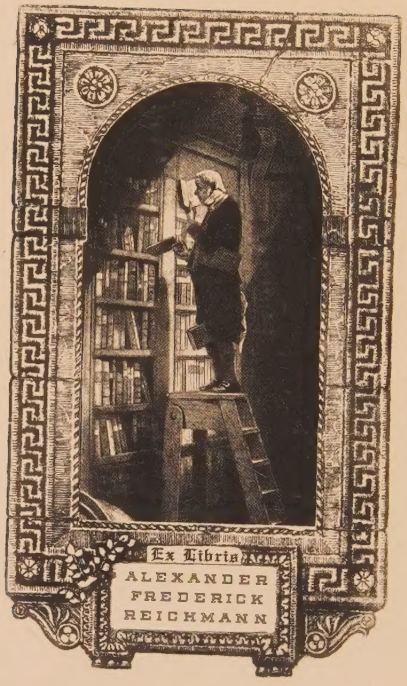

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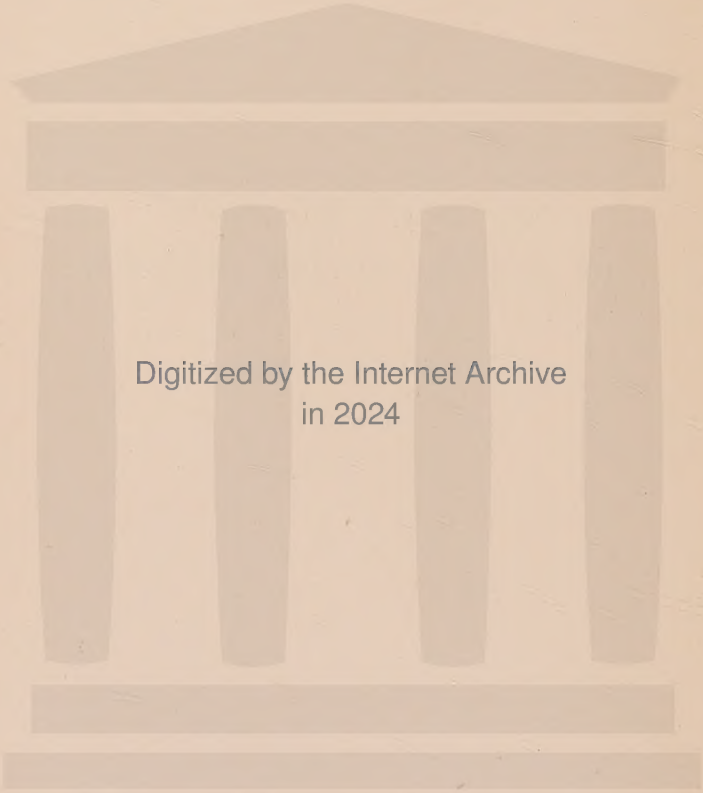
VOLUME THREE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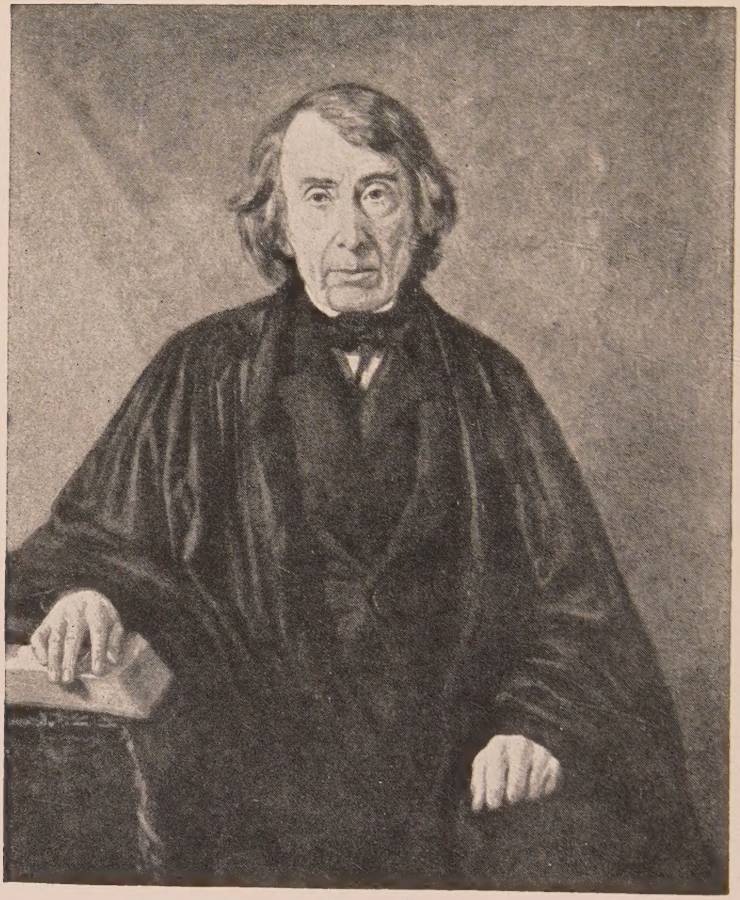

ROGER BROOKE TANEY
From the portrait by G. P. A. Healy.

THE SUPREME COURT
IN
UNITED STATES HISTORY

BY

CHARLES WARREN

FORMERLY ASSISTANT ATTORNEY-GENERAL OF THE UNITED STATES
AUTHOR OF "A HISTORY OF THE AMERICAN BAR"

IN THREE VOLUMES

VOLUME THREE

1856–1918

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ABBREVIATIONS OF TITLES OF BOOKS FREQUENTLY CITED

[For the purpose of conciseness in the citation of books most frequently quoted, the following abbreviations have been used in the notes.]

J. Q. Adams, Memoirs of John Quincy Adams (1874–1877), edited by Charles Francis Adams, 12 vols.

J. Q. Adams' Writings, The Writings of John Quincy Adams (1913–1915), edited by Worthington Chauncey Ford, 7 vols.

Clay, The Works of Henry Clay (1904), edited by Calvin Colton, Federal edition, 10 vols.

Curtis, The Life and Writings of Benjamin Robbins Curtis, LL.D. (1879), edited by Benjamin R. Curtis, 2 vols.

Hamilton, The Works of Alexander Hamilton (1904), edited by Henry Cabot Lodge, 12 vols.

Hamilton (Lodge's ed.), *The Works of Alexander Hamilton* (1885–1886), edited by Henry Cabot Lodge, 9 vols.

Hamilton (J. C. Hamilton's ed.), *The Works of Alexander Hamilton* (1850–1851), edited by John Church Hamilton, 7 vols.

Iredell, Life and Correspondence of James Iredell (1858), edited by Griffith John McRee, 2 vols.

Jay, The Correspondence and Public Papers of John Jay (1890–1893), edited by Henry Phelps Johnston, 4 vols.

Jefferson, The Works of Thomas Jefferson (1904–1908), edited by Paul Leicester Ford, 12 vols.

Jefferson (A. C. Lipscomb ed.), *The Writings of Thomas Jefferson* (1903–1904), edited by Andrew C. Lipscomb, 20 vols.

Jefferson (H. A. Washington ed.), *The Writings of Thomas Jefferson* (1853–1854), edited by Henry Augustine Washington, 9 vols.

King, The Life and Correspondence of Rufus King (1894–1900), edited by Charles Ray King, 6 vols.

Madison, The Writings of James Madison (1906–1910), edited by Gaillard Hunt, 9 vols.

Madison (1865), *Letters and Other Writings of James Madison* (1865), published by order of Congress, 4 vols.

Marshall, Life of John Marshall (1916–1919), by Albert Jeremiah Beveridge, 4 vols.

Mason, Memoir and Correspondence of Jeremiah Mason (1873), edited by George S. Hillard.

Monroe, The Writings of James Monroe (1898–1903), edited by Stanislaus Murray Hamilton, 7 vols.

Story, Life and Letters of Joseph Story (1851), by William Waldo Story, 2 vols.

Sumner, Memoir and Letters of Charles Sumner (1877–1893), by Edward Lillie Pierce, 4 vols.

Taney, Memoir of Roger Brooke Taney (1872), by Samuel Tyler.

Ticknor, Life, Letters and Journals of George Ticknor (1876), 2 vols.

Washington, Writings of George Washington (1834–1837), edited by Jared Sparks, 11 vols.

Washington (Ford's ed.), *Writings of George Washington* (1886–1893), edited by Worthington Chauncey Ford, 14 vols.

Webster, The Writings and Speeches of Daniel Webster (1903), 18 vols.

Wirt, Memoirs of the Life of William Wirt (1849), by John Pendleton Kennedy, 2 vols.

THE SUPREME COURT
IN UNITED STATES HISTORY

THE SUPREME COURT IN UNITED STATES HISTORY

VOLUME THREE

CHAPTER TWENTY-SIX

THE DRED SCOTT CASE

1856–1857

At this critical juncture, when at the North the faith of the general public in the Court's impartiality had been seriously weakened by the undeserved attacks of the anti-slavery press and politicians, the famous case of *Dred Scott* v. *Sandford*, 19 How. 393, came on for argument in the spring of 1856. In attributing wholly to Chief Justice Taney's opinion in this case the passionate hostility towards the Court which followed its decision in 1857, historians have too largely overlooked the fact that the undermining campaign directed against the Court, preparatory to this overturn in the hearts of the people, had been carried on for nine years. The *Dred Scott Case* had been first docketed in the Court in December, 1854, at the same time when the appeals in the *Booth Cases* from Wisconsin were filed. While the former case has received more attention from jurists and historians, it was the latter which aroused the greatest attention and excitement at the time when they were pending. Of the *Dred Scott Case* little was generally

known until shortly before it came on for argument in February, 1856. (Although charges were made later that the case had been "fabricated" by the slavery party in order to secure a decision by the Court, the absurdity and falsity of the suggestion was apparent, when all the facts as to its history became known.[1])

In the autumn of 1846, and hence before the power of Congress over slavery in the Territories had become a vital issue, a negro, Dred Scott, began a suit against the widow of his former master, in the State Circuit Court in St. Louis, based on the ground that his former master, Dr. Emerson, had taken him into Illinois, and thence into the Louisiana Territory (now Minnesota), and that thereby, under the Northwest Territory Ordinance of 1787 and under the Missouri Compromise Act, he had become a free man, which status still affected him, when later his master took him back into the slave State of Missouri. In January, 1850, he obtained a verdict; but on appeal, the State Supreme Court held, in 1852, that under the laws of Missouri he resumed his character of slave on his return, irrespective of his status while out of the State. In November, 1853, noted anti-slavery lawyers in St. Louis instituted in the United States Circuit Court, on his behalf, a suit for trespass; and in order to vest jurisdiction in this Federal

[1] These charges were made and reiterated in the spring and winter of 1856; see the *New York Tribune* and the *New York Courier*, Dec. 18, 19, 1856, March 16, 1857; *Independent*, Jan. 1, 1857; *Ohio Statesman*, April 3, 1857; and counter-charges that the case was instituted and appealed by the anti-slavery party. Reverdy Johnson said, March 16, 1858: "The Senator's insinuation that the case was made by the master for the purpose of obtaining a decision by the Supreme Court is so far from being true, that the suspicion, at the time, was that the political friends of the Senator — the abolitionists — had had it instituted and brought here with that exclusive end. But that was equally unfounded, as was stated by Mr. Blair in open Court." *35th Cong., 1st Sess.*

Prof. John W. Burgess in *The Middle Period* (1898), 449 *et seq.*, gives a detailed account of the origin of the case, obtained from A. C. Crane of St. Louis, a clerk in the office of Dred Scott's counsel, Roswell M. Field, and says: "There is certainly not the slightest evidence in the history of the case that the case was anything but a genuine proceeding, from beginning to end conducted by anti-slavery men."

Court on the ground of diverse citizenship, a fictitious sale of Scott was arranged by Mrs. Emerson (who had then become the wife of a strong abolitionist member of Congress from Massachusetts, Dr. C. C. Chaffee) to her brother, John F. A. Sandford of New York (a son-in-law of Pierre Chouteau of St. Louis).[1] In this suit, a verdict was found against Scott, on May 15, 1854, on rulings of law, and on writ of error the case was taken to the United States Supreme Court. At this stage, it seemed probable that its decision might call for an expression of opinion by the Court as to the hotly debated question of the power of Congress to exclude slavery from the Territories. Before the case was docketed, however, Congress had passed the Kansas-Nebraska Act, on May 30, 1854, repealing the Missouri Compromise Act by specifically enacting that it was "inoperative and void", and declaring that it was the true intent and meaning of the present Act, "not to legislate slavery into any Territory or State nor to exclude it therefrom." By this legislation, the power of Congress over the subject was denied, and the long-continued efforts of the Free-soilers to exclude slavery from the Territories by Congressional enactment seemed permanently defeated. Had the slavery party been responsible for the institution of the *Dred Scott Case*, it is clear that it had little to gain by risking a ruling from the Court on a point which Congress had already effectually decided, for itself. The anti-slavery party, on the other hand, had an interest in prosecuting the appeal; for an adverse judicial decision would not make their position any worse than it was under the Kansas-Nebraska Act, and a favorable decision might give

[1] Sandford became insane before the case was decided; and it was said that the appeal was fought in the United States Supreme Court contrary to his wish; see *New York Courier*, Dec. 18, 1856, March 16, 1857. The Court costs were paid by Taylor Blow of St. Louis, son of the man who sold Scott to Dr. Emerson.

their cause an effective moral impetus. The case came on for argument on Monday, February 11, 1856. "It involves questions of much political interest," said the newspapers. "They are first, whether a free black man is a citizen of the United States, so as to be competent to sue in the Courts of the United States; second, whether a slave carried voluntarily by his master into a free State and returning voluntarily with his master to his home, is a free man by virtue of such temporary residence; thirdly, whether the eighth Section of the Missouri Act of 1820, prohibiting slavery north of latitude 36′ 30″, is constitutional or not." Arguments were made for the negro by Montgomery Blair of St. Louis (who had been retained by the local Missouri counsel, Roswell M. Field)[1], and for the alleged owner,

[1] An interesting account by Blair of the manner in which he happened to argue the case appeared in the *National Intelligencer*, Dec. 24, 1856: "From an imperfect knowledge of the circumstances attending the suit for freedom before the Supreme Court, prosecuted by Dred Scott (a negro) several correspondents of the New York press have made suggestions tending to mislead public opinion. One intimates that the suit was a contrived case to operate on the late Presidential election by bringing under the review and judgment of the Supreme Court the questions which have so stirred the public mind since the repeal of the Missouri Compromise. Another surmises that selfish motives influenced certain distinguished members of the Bar in declining the request to lend me their assistance in behalf of my client's cause; and a third seems to suspect my own in conducting it alone. As the peculiar attitude of political affairs at this moment gives much interest to the case, I will be pardoned for giving a brief narrative of it. . . . As I perceived that the cause involved important issues which might possibly be engulphed in the great political controversy then just emerging in relation to the power of Congress over the territory of the United States, I felt it my duty to seek assistance, especially as when I found arrayed against me the Senator from Missouri, and the late Attorney-General, among the first men of the profession of the East and the West. I sought to obtain the support of one of the ablest men at the Bar in the South, and he had almost consented to yield it. His inclination was surrendered, not, I well know, from the selfish motive given in the press. I then applied to leading members of the profession in the North, and with the same result. The mercenary motive imputed for the reluctance shown to engage in it is equally unjust to all. The truth is, while some gave it up because their previous engagements interrupted, and others because the late application did not give time to make preparation, all perceived that, from the nature of the case, it must assume an aspect more or less affecting the party struggles impending, and were unwilling on all accounts to add to this embarrassment of the cause or that of the party with which they stood connected, by implicating either themselves or it by their action in the result. While I do myself deprecate the state of things which brings a political and

Sandford, by Henry S. Geyer (then Senator from Missouri) and Reverdy Johnson. On February 18, the Washington correspondent of the *New York Tribune*, James S. Pike, stated that a judgment was expected within a fortnight, and that though nothing could be positively known as to its character, "there is a speculation abroad which almost amounts to conviction that the decision of the Circuit Court will be affirmed, and principally upon the pretext that Scott voluntarily returned to the State of Missouri, by which act the authority of the owner was restored and the condition of slavery was resumed." [1] On February 28, Pike wrote that there were "some indications that a direct issue may be evaded, on the ground that Scott, being a colored man, is not a citizen of Missouri in the legal point of view, and therefore cannot bring an action properly. This judgment would deny the jurisdiction of the Supreme Court, and possibly prevent the expression of dissenting opinions on the constitutionality of the Missouri Compromise; an effort will be made to get a positive decree of some sort, and in that event, there is some hope of aid from the Southern members of the Court." These mere surmises as to the Court's probable action were surprisingly in accord with the facts. The Court, after adjourning during the month of March, reconvened on April 1; and Pike writing to the *Tribune*, April 7, stated that the Court had held two consultations on the case, that McLean, Curtis and Grier would probably concur in favor of the slave, that Nelson's attitude was uncertain, that sectional sentiment would unite the other five Judges from the South and that there was "a mani-

a partisan influence to act upon the public mind in connection with this case, and while willing to avoid it as much as possible, I yet felt it was my duty to call to its support all the aid I could command. When I first opened the case, therefore, I announced to the Court the regret I felt in not having prevailed in getting an associate in the cause."

[1] *New York Tribune*, Feb. 18, 20, 26, 29, April 9, 10, 11, 12, 1856.

fest disposition to avoid the real issue by the introduction of a question affecting the jurisdiction of the Court." The next day, he wrote that four of the Judges had already united in admitting the jurisdiction; that there was hope that the decree might be made upon the merits; and that the final consultation would be held on the next (Wednesday) night. On Thursday, a correspondent wrote that it was understood that a majority had declared in favor of jurisdiction — McLean, Curtis, Grier, Campbell and Catron against Taney, Wayne, Nelson and Daniel; but that Catron and Campbell would join with the minority in denying freedom to the slave on the merits of the case; and that McLean and Curtis, with Grier concurring, would give dissenting opinions sustaining the constitutionality of the Missouri Compromise; "the decree will be delivered next week and the opinion will make a sensation."[1] That this was merely a guess upon the part of the newspapers is seen from the fact that at this very time, Judge Curtis wrote to his uncle in Boston, George Ticknor, in strict confidence, April 8, that "the Court will not decide the question of the Missouri Compromise line — a majority of the Judges being of opinion that it is not necessary to do so."[2] And the incorrectness

[1] Another correspondent, writing Thursday, April 10, 1856, said: "The majority of the Court will decide against him. But there is such a thing as a minority left on the Bench notwithstanding the Court has been denounced as the Citadel of Slavery; and unless all impressions are erroneous, Judge McLean will fortify their position with an opinion that cannot fail to confound those who are prepared to repudiate the judgments of Southern Courts and the practice of Southern States. Judge Curtis it is believed will also contribute a powerful exposition of the case and of all the incidental questions connected with it, and Judge Grier will concur with both. Of course, the South will go in a body and probably carry Judge Nelson with them."

[2] *Curtis*, I, 180. Curtis continued: "The one engrossing subject in both Houses of Congress, and with all the members, is the Presidency; and upon this everything done and omitted, except the most ordinary necessities of the country, depends. Judge McLean hopes, I think, to be a candidate for office. He would be a good President, but I am not willing to have a Judge in that most trying position of being a candidate for this great office."

of the newspaper's statement as to the line-up of the Judges was later proved by Judge Campbell's account. It appears that the Court was divided on the question as to whether the jurisdictional point as to citizenship was properly before them — Taney, Wayne, Daniel, Nelson and Curtis considering it to be so, but McLean, Catron, Campbell and Grier taking the contrary view. Nelson, however, entertaining doubts asked for a re-argument, which was ordered, May 12, 1856.[1] As the Presidential campaign was to occur in the fall of 1856, the sentiment very generally prevailed that the Court had acted wisely in not giving a decision on this delicate question prior to the election. And as the *New York Courier* said, in praise of the Court's action: "The great tribunal to which the country has been taught for nearly three quarters of a century to look up for the dispensation of justice upon the principles of law, is not prepared to rush into the political arena, and ruffle its ermine in the strife of politicians and the squabbles of demagogues." The Court, however, was assailed by the *New York Tribune*, which said that "the black gowns have come to be artful dodgers."

For six months, while the Presidential campaign was being fought, little notice of the case appeared in the press or elsewhere. Its existence on the Court's docket had hardly been known to the public, prior to its first argument. In all the exhaustive debates in Congress on the slavery issue throughout the years 1855 and 1856, the case was not even adverted to. But by the time when it was reached for its second argument, in December, 1856, the immense effect which a Court decision upon the power of Congress might have, in connection with future legislation as to slavery in the Territories,

[1] See Campbell's statement at the meeting of the Supreme Court Bar on the death of Benjamin R. Curtis, Oct. 13, 1874, 20 Wall, x, xi.

was thoroughly realized. "Taking into consideration the state of the country . . . it may well be regarded as the most important that has ever been brought before that tribunal," said the *New York Courier*. "Never has the Supreme Court had a case before it so deeply affecting its own standing before the Nation. . . . The issue is of vast importance in itself, but there is another problem connected with it of far greater consequence. It is, whether the Supreme Court is a political Court made up of political judges. . . . While yet reeking with the passions of the political arena, this question is transferred to that tribunal, which of all others is supposed to be clearest of passion—a tribunal which has, in time past, challenged the deference of the country for its lofty impartiality and serene independence. How will the Judges abide the test now before them? . . . The Court, in trying this case, is itself on trial—a trial as vitally involving its character before the American people, as a confidence in its impartiality is vital to its authority. . . . The Court has thus far disappointed the hopes of the agitators, and vindicated its own high and conservative character. It refused to throw any opinion into the political arena, last summer." [1]

The second argument was made before the Court on December 15, 16, 17 and 18, 1856, by Blair, Geyer, Johnson and by George Ticknor Curtis of Massachusetts (who had been retained by Blair, after the case was

[1] *New York Courier*, Dec. 18, 23, 1856; *New York Tribune*, Dec. 19, 1856; Alexander H. Stephens of Georgia, Dec. 15, 1856 (the date on which the second argument began) wrote: "I have been urging all the influences I could bring to bear upon the Supreme Court to get them to postpone no longer the case on the Missouri Restriction before them, but to decide it. They take it up today. If they decide, as I have reason to believe they will, that the restriction was unconstitutional, that Congress had no power to pass it, then the question — the political question — as I think, will be ended as to the power of the people in their Territorial Legislatures. It will be in effect a re-adjudication." *Life of Alexander H. Stephens* (1883), by Richard M. Johnson and William H. Browne.

begun, to argue the constitutional point involved). Of the arguments, a Washington correspondent wrote: "Mr. Blair is a close, logical reasoner, a man of diligent and careful research, strong power of thought, but a very poor pleader. His manner is awkward, his gesticulation particularly painful, and his utterance slow and with the appearance of being obstructed. But his argument would read well. Reverdy Johnson, Esq., is an old stager in the elocutionary list, and drew a crowded chamber to listen to his plea. . . . The learned barrister entered into his argument, with all the fervor and power of appeal that has characterized the most ultra-Congressional and stump speeches for slavery to which it had been my misfortune to listen. The passions of his audience, the prejudices of the Judges were appealed to, until I came to the realization of the fact that our Supreme Court is composed of men, mere men after all, with the like passions and prejudices of the masses. . . . The closing argument of Mr. Curtis of Boston was able, clear and, to me, conclusive. It lacked in one feature — it was too brief. . . . This, however, was not the fault of the learned counsellor, but that of the Court, which limited him to one hour and a quarter."[1] Of Curtis' argument, his brother, Judge Curtis, wrote that it was made "in a manner exceedingly creditable to himself and to the Bar of New England. Judge Catron told me it was the best argument on a question of constitutional law, he had heard in the Court — and he has been here since General Jackson's time"; and the *New York Tribune* said that it "commanded marked attention from the Court, and attracted the largest audience from Congress that has yet assembled, as well as a number of the most distin-

[1] *Independent*, Jan. 1, 1857; see also *Boston Post* and *New York Tribune*, Dec. 16, 17, 18, 19, 1856, for full descriptions of the arguments of all the counsel.

guished jurists"; that it was "happily conceived in style and manner. The admission was general and frank on all sides that Mr. Curtis acquitted himself with eminent ability. . . . He was congratulated warmly and by several Southern Senators."[1] Of Johnson's argument, the *New York Courier* said that it would rank with the finest efforts made at the Bar; that since Webster's death Johnson had no superior; but that his argument against the constitutionality of the Missouri Compromise was not convincing. The *New York Times* said that while "well considered and compact, it was about as remarkable for what it did not contain as for what it did"; the *Tribune* said that it "partook more of the character of a stump speech than that of a jurist. It was brilliant, eloquent and witty, of course; but in dealing with the grave question of human freedom or slavery and the status of slavery under the Constitution, the learned gentleman substituted sarcasm and ridicule of opposing views for the logic, which alone can convince a mind, seeking to know the truth."[2]

At the close of the argument, the grave effect of the coming decision upon political conditions was again reflected by Pike in the *Tribune*, saying: "The Court may think it wise, under the existing circumstances of excitement on the topic throughout the country, to place a decision of the case upon a subordinate issue. Yet the urgency of the slave-power is great — the temper of the slave holders within the Bar and without the Bar, to say nothing of the Bench, is raised to crush the rebellious spirit of the North; and a decision of the Supreme Court is eagerly desired which shall promote this end. Prudence may, however, prevail,

[1] The *National Intelligencer*, Jan. 1, 1857, published the "confessedly very able argument" of Curtis.

[2] *New York Courier*, Dec. 18, 19, 1856; *New York Times*, Dec. 20, 1856; *New York Tribune*, Dec. 17, 18, 19, 20, 22, 24, 1856.

and the Court refrain from enunciating a decision which would neither enhance its reputation nor strengthen its influence." No one, he further said, could "have failed to observe, in the growth and development of the ideas which underlie the case now under adjudication, that our judicial decisions upon constitutional questions touching the subject of slavery are rapidly coming to be the enunciation of mere party dogmas; that the country is dividing geographically upon questions of constitutional law; and that, in the process of time, if we continue a united people, what the law of the country and the Courts is, will depend upon the political ascendancy for the time being of the doctrines of freedom or slavery." [1]

The pendency of the *Dred Scott Case* first became the subject of attention in Congress, when, on January 12, 1857, Benjamin Stanton of Ohio introduced a resolution in the House for legislation to reorganize the Court "so as to equalize the population and business of the several Circuits and districts and give to all sections of the Confederacy their equal and just representation on the Supreme Court." [2] In an elaborate speech, he pointed out the disproportionate representation of the South, and contended that unless this should be changed, the Court's decision "can have no moral power and cannot command the confidence of the people" and he added:

[1] *New York Tribune*, Dec. 20, 1856. For a reply to attacks of this nature, see *Boston Post*, Dec. 27, 1856.

[2] *34th Cong., 3d Sess.*, Jan. 12, 1857. The white population in the Circuits was:

1st (Maine, N. H., Mass., R. I.)	2,028,594
2d (N. Y., Conn., Vt.)	3,724,826
3d (Pa., N. J.)	2,723,669
4th (Del., Md., Va.)	1,383,912
5th (Ala., La.)	682,005
6th (No. Car., So. Car., Ga.)	1,394,163
7th (Ohio, Ind., Ill., Mich.)	4,173,309
8th (Ky., Tenn., Mo.)	2,110,253
9th (Miss., Ark.)	457,907

If the Supreme Court is to be called in to aid in the settlement of the great political questions which agitate the country, its organization becomes a matter of paramount importance. If the South choose to preserve its present partial and sectional organization, for the purpose of securing its aid in the political contests of the day, they will find they may destroy the Court, without aiding the party or section in whose favor it decides. . . . It is my deliberate conviction that nothing could do so much to weaken the bonds of this Confederacy, and destroy the confidence of the people in the Federal Government and the value of the Union, as a decision of that Court that Congress has no sovereign power over the Territories, and that it cannot legislate for them, either for the exclusion of slavery, or upon any other rightful subject of legislation.

He concluded his speech by contending for the right of a State, as proclaimed by the Virginia-Kentucky Resolutions of 1798–1799, to refuse obedience to any law which it deemed to be "a plain, palpable and deliberate violation of the Constitution", and to disregard a decision of the Court sustaining such a law. These sentiments from an Ohio Whig were controverted by a Virginia Democrat; and an anti-slavery paper noted that "the domineering sectionalists of the country already begin to see the value of Union, and nullifying South Carolina already denounces the move as 'an assault upon the integrity of the Supreme Court.' " [1]

The Court did not meet for conference as to its decision in the *Dred Scott Case*, until late in February; for, as Judge Curtis wrote to his brother: "Our aged Chief Justice, who will be eighty years old in a few days, and who grows more feeble in body, but retains his alacrity and force of mind wonderfully, is not able to write much. Judge Wayne has been ill much of the

[1] *New York Evening Post*, Jan. 13, 1857.

winter. Poor Judge Daniel has been prostrated for months by what was a sufficient cause; for his young and interesting wife was burned to death by her clothes accidentally taking fire, almost in his presence. So the rest of us have been kept at the oar, as Judge Story used to say 'double tides.' "[1] But in spite of the fact that there had been no conference, the newspaper correspondents in Washington filled the columns of their papers with detailed rumors as to the alleged decision which the Court had reached; and all agreed that the decision would be adverse to the plaintiff, though they differed as to the probable grounds on which it would be based.[2] The *Tribune* correspondent wrote on January 5, 1857: "The rumor that the Supreme Court has decided against the constitutionality of the power of Congress to restrict slavery in the Territories has been commented upon in the most unreserved manner at this metropolis. It is very generally considered that the moral weight of such a decision would be about equal to that of a political stump speech of a slaveholder or a doughface. Many have expressed the opinion that the question would not be met by the Court, and numbers are still of that way of thinking. It makes but little difference to slavery whether it gets a decision in its favor now or after the public mind shall have had time to cool. . . But it would be best for anti-slavery that the decision should come now, while the popular heart is in a fused condition. The impression it would thus make would be deeper and more distinct, and the whole

[1] *Curtis*, I, 192, letter of Feb., 1857.

[2] *New York Tribune*, Jan. 4, 5, 7, 8, 9, 1857; *New York Courier*, Jan. 7, 1857; *Independent*, Jan. 8, 1857. As early as January 2, 1857, the *Tribune's* Washington correspondent wrote that there was a rumor in Washington that the Court, with two dissenting, had reached a decision adverse to the constitutionality of the Missouri Compromise, and said that there was no truth in the statement, but that "whenever judgment shall be rendered it will be found, if the real merits of the case are considered, that the tribunal will be nearly divided, unless extraneous influences should prevail."

series of pro-slavery aggressions and triumphs would then be burned into it together. The Congress, the Court, and the Executive would then take their proper position of joint association, in the mind of the people, as confederates in the work of extending the intolerable nuisance of slavery. It is, therefore, to be preferred that the judicial department shall now put itself actively upon the side of the slaveholders, while the mind of the country is warm and burning, rather than wait and do it by and by, when apathy shall have again overspread it. . . . Judicial tyranny is hard enough to resist under any circumstances, for it comes in the guise of impartiality and with the prestige of fairness. If the Court is to take a political bias, and to give a political decision, then let us, by all means, have it distinctly, and now. The public mind is in a condition to receive it with the contempt it merits."

It is evident that the views entertained by the Court were very generally discussed around Washington. Alexander H. Stephens wrote to a friend, January 1, 1857, a summary which, though purporting to contain information obtained "*sub rosa*", was, at that date, an inaccurate statement of the decision then arrived at by the Court: "Today I send you the speech of Curtis on the *Dred Scott Case* before the Supreme Court. The speech I think chaste, elegant, forensic; but I do not think it convincing. The case is yet undecided. It is the great case before the Court, and involves the greatest questions, politically, of the day. I mean that the questions involved, let them be decided as they may, will have a greater political effect and bearing than any others of the day. The decision will be a marked epoch in our history. I feel a deep solicitude as to how it will be. From what I hear, *sub rosa*, it will be according to my own opinions on every point, as abstract

political questions. The restriction of 1820 will be held to be unconstitutional. The Judges are all writing out their opinions, I believe, *seriatim*. The Chief Justice will give an elaborate one. Should this opinion be as I suppose it will, 'Squatter Sovereignty speeches' will be upon a par with 'Liberty speeches' at the North in the last canvass." Montgomery Blair wrote to Van Buren, February 5, that: "It seems to be the impression that the opinion of the Court will be adverse to my client and to the power of Congress over the Territories, but I am assured that the Court has not yet held a conference on the case." [1]

It was not until February 15, that the Judges first met in conference. An agreement was then reached that the Court should give no opinion upon the constitutionality of the Missouri Compromise Act, but should decide the case upon the point that, whatever effect the negro's residence in Illinois and in the Northwest Territory had upon his status there, his status in Missouri, after his return to that State, must depend upon the law of Missouri; and that Missouri, by its law as laid down by its Supreme Court, regarded him as a slave, and hence incapable of maintaining suit in the Federal Circuit Court. To Judge Nelson was assigned the duty of writing the opinion of the Court. Within a few days, however, it was found that the two dissenting Judges — McLean and Curtis, intended to write opinions discussing at length and sustaining the constitutionality of the Compromise Act. This action forced the majority of the Judges to reconsider the necessity of discussing that point as well, themselves. Judge Wayne (as he himself said in conversation, and as

[1] *Life of Alexander H. Stephens* (1883), by Richard M. Johnson and William H. Browne, 318; *Van Buren Papers MSS*, letter of Blair to Van Buren, Feb. 5, 1857.

Judge Curtis stated later) "became convinced that it was practicable for the Court to quiet all agitation on the question of slavery in the Territories by affirming that Congress had no constitutional power to prohibit its introduction. With the best intentions, with entirely patriotic motives, and believing thoroughly that such was the law on this constitutional question, he regarded it as eminently expedient that it should be so determined by the Court."[1] Accordingly, Wayne succeeded in persuading Taney, Campbell, Daniel and Catron that the assignment of the opinion to Judge Nelson should be withdrawn, and that the Chief Justice should write the opinion of the Court, covering all the points involved. It appeared, however, that Judge Grier was still averse to expressing an opinion on the constitutional question; and consequently Judge Catron took the unusual course of writing a confidential letter to Buchanan, the President-elect, February 19, in which he informed Buchanan that the constitutional question would be decided by the Court (though he gave no statement as to the way in which it would be decided), and in which he asked Buchanan to "drop Grier a line, saying how necessary it is, and how good the opportunity is, to settle the agitation by an affirmative decision of the Supreme Court, the one way or the other. . . . He has no doubt about the question on the main contest, but has been persuaded to take the

[1] *Curtis*, I, 206, 234, 235, 236. G. T. Curtis stated: "I never heard Judge Curtis . . . impute to Judge Wayne or the Chief Justice any motive, but the mistaken supposition that the public excitement in regard to slavery in the Territories could be quieted by a judicial decision adverse to the power of Congress to prohibit its introduction. I think that he regarded this as Judge Wayne's motive, and with good reason; and that he was satisfied that Judge Wayne imparted this conviction to the Chief Justice. But I do not think that he ever, for an instant, imputed to Judge Wayne that he was influenced by Mr. Buchanan to do what he did, nor do I myself believe that such was the fact. Indeed, I do not imagine that Mr. Buchanan was a man who would tamper with the administration of justice, and I am sure that the Chief Justice and Judge Wayne would never have brooked such an attempt." See also *Taney*, 373–392.

smooth handle for the sake of repose." [1] Buchanan apparently complied with Catron's request, and wrote to Grier, who replied, February 23, in an interesting letter, giving to Buchanan, in strict confidence, a full statement of the manner in which the Judges had decided to treat the case. Such a letter would not at the present time be regarded as one of strict propriety; but at the time it was written, it was not an infrequent occurrence for the Judges to impart, in confidence, to an intimate friend or relative the probable outcome of a pending case. Judge Curtis had so written to his uncle, as to this very case, during the previous year; Judge Story frequently indulged in the habit; and it seems to have been regarded as a proper practice, provided the seal of secrecy was imposed.[2] Grier's letter was as follows:

Your letter came to hand this morning. I have taken the liberty to show it, in confidence, to our mutual friends, Judge Wayne and the Chief Justice.

[1] *Works of James Buchanan* (1908–1911), X, 106. The letter was as follows: "The Dred Scott case has been before the Judges several times since last Saturday, and I think you may safely say in your Inaugural: 'That the question involving the constitutionality of the Missouri Compromise line is presented to the appropriate tribunal to decide: to wit, to the Supreme Court of the United States. It is due to its high and independent character to suppose that it will decide and settle a controversy which has so long and seriously agitated the country, and which *must* ultimately be decided by the Supreme Court. And until the case now before it (on two arguments) presenting the direct question, is disposed of, I would deem it improper to express any opinion on the subject.' A majority of my brethren will be forced up to this point by two dissentients. Will you drop Grier a line, saying how necessary it is, and how good the opportunity is, to settle the agitation by an affirmative decision of the Supreme Court, the one way or the other. He ought not to occupy so doubtful a ground as the outside issue — that admitting the constitutionality of the Missouri Compromise Law of 1820, still, as no domicile was acquired by the negro at Fort Snelling, and he returned to Missouri, he was not free. He has no doubt about the question on the main contest, but has been persuaded to take the smooth handle for the sake of repose."

[2] It is evident that Judge Campbell was ignorant of this correspondence, for he wrote to Samuel Tyler (Taney's biographer), Nov. 24, 1870: "I have not the slightest information of any connection between Mr. Buchanan or any other person, with the discussions in the Court or the conference, or with the preparation of any opinion of either of the Judges, save the Judges themselves."

We fully appreciate and concur in your views as to the desirableness at this time of having an expression of the opinion of the Court on this troublesome question. With their concurrence, I will give you in confidence the history of the case before us, with the probable result. Owing to the sickness and absence of a member of the Court, the case was not taken up in conference till lately. The first question which presented itself was the right of a negro to sue in the Courts of the United States. A majority of the Court were of the opinion that the question did not arise on the pleadings and that we were compelled to give an opinion on the merits. After much discussion it was finally agreed that the merits of the case might be satisfactorily decided without giving an opinion on the question of the Missouri Compromise; and the case was committed to Judge Nelson to write the opinion of the Court affirming the judgment of the Court below, but leaving these difficult questions untouched. But it appeared that our brothers who dissented from the majority, especially Justice McLean, were determined to come out with a long and labored dissent, including their opinions and arguments on both the troublesome points, although not necessary to a decision of the case. In our opinion both the points are *in* the case and may be legitimately considered. Those who hold a different opinion from Messrs. McLean and Curtis on the power of Congress and the validity of the Compromise Act feel compelled to express their opinions on the subject. Nelson and myself refusing to commit ourselves. A majority including all the Judges south of Mason and Dixon's line agreeing in the result, but not in their reasons, — as the question will be thus forced upon us, I am anxious that it should not appear that the line of latitude should mark the line of division in the Court. I feel also that the opinion of the majority will fail of much of its effect if founded on clashing and inconsistent arguments. On conversation with the Chief Justice, I have agreed to concur with him. Brother Wayne and myself will also use our endeavors to get brothers Daniel and Campbell and Catron to do the same. So that if the question must be met, there will be an opinion of the Court upon it, if possible, without the contradictory views which would weaken its force. But I fear some rather extreme views may

be thrown out by some of our southern brethren. There will therefore be six, if not seven (perhaps Nelson will remain neutral) who will decide the Compromise law of 1820 to be of *non-effect.* But the opinions will not be delivered before Friday the 6th of March. We will not let any others of our brethren know anything about *the cause of our anxiety* to produce this result, and though contrary to our usual practice, we have thought it due to you to state to you in candor and confidence the real state of the matter.

As has been well said, these letters of Catron and Grier were "obviously inconsistent with, and tacitly refute, the charge that the *Dred Scott Case* was the result of a 'conspiracy' in which the Kansas-Nebraska bill was the first step. As the facts are narrated by Mr. Justice Grier, the action eventually taken in the case seems to have been brought about by the activity of the minority, rather than of the majority of the Court." [1] So far from being anxious to decide the constitutional question involved, the majority of the Judges appear to have tried to avoid committing themselves upon the point, until forced to do so by the insistence of the minority in expressing their views upon it.

On March 4, 1857, the new President, James Buchanan, came into office, and in his Inaugural Address, after reciting the fact that Congress had applied "to the settlement of the question of domestic slavery in the Territories . . . this simple rule that the will of the majority shall govern", and after saying that "a difference of opinion has arisen in regard to the point of time when the people of a Territory shall decide this question for themselves", he proceeded to state: "This is happily a matter of but little practical importance. Besides, it is a judicial question which legitimately belongs to the Supreme Court of the United States before whom it is now pending, and will, it is understood, be

[1] *Works of James Buchanan* (1910), X, 106–108, note.

speedily and finally settled. To their decision, in common with all good citizens, I shall cheerfully submit, whatever this may be, though it has ever been my individual opinion that, under the Kansas-Nebraska Act, the appropriate period will be when the number of actual residents in the Territory shall justify the formation of a Constitution with a view to its admission as a State into the Union." [1]

On the same day, Attorney-General Cushing addressed the Court for the last time in his official capacity, the new President having appointed Jeremiah S. Black as Attorney-General; and in his valedictory, Cushing paid the following eloquent tribute to the Court and to the confidence reposed in it by the country. "In the complex institutions of our country," he said, "you are the pivot point, upon which the rights and liberties of all, Government and people alike, turn; or rather, you are the central light of constitutional wisdom around which they perpetually revolve. Long may this Court retain the confidence of our country as the great conservators, not of the private peace only, but of the sanctity and integrity of the Constitution. . . . To you and your venerable Chief, venerable not more in years than in accumulated wisdom of a long life of high duties, to you, I say, worthy successors of the judicial Fathers of the Republic, our country looks with undoubting confidence, as the interpreters and guardians of the organic laws of the Union." [2] How little Cushing foresaw the storm which was to break upon the Court's head, within three days after his remarks, and how little the anti-slavery party was inclined to accept Buchanan's statement that the

[1] It is interesting to compare this with the statement suggested by Catron to be included in the Inaugural Address, in Catron's letter to Buchanan, *supra*.

[2] *National Intelligencer*, March 5, 1857.

question of slavery in the Territories was about to be "finally settled", by a decision of the Court, may be seen from the editorial comment of the *New York Tribune*, on the day after the Inauguration. "You may 'cheerfully submit', of course, you will," it said, addressing itself to Buchanan, "to whatever the five slaveholders and two or three doughfaces on the bench of the Supreme Court may be ready to utter on this subject. But not one man who really desires the triumph of Freedom over Slavery in the Territories will do so. We may be constrained to obey, as law, whatever that tribunal shall put forth; but happily this is a country in which the People make both laws and Judges, and they will try their strength on the issue here presented." Surmises as to the nature of the forthcoming decision were made in a letter from the *Tribune's* Washington correspondent, written March 5 (but not published until March 9), in which he stated that the Court had held a final consultation that morning, and would reach its opinion the next day. "No doubt now exists as to the character of the decree. A large majority will hold that the recent decisions of the Supreme Court of Missouri . . . determine the case . . . Judges McLean, Curtis and Grier will deliver dissenting opinions. . . The expectation is entertained that this decree will satisfy the country, and Mr. Buchanan referred to it with confidence in his inaugural, yesterday, founded upon a knowledge of the foreshadowed purpose."[1] This letter has often been cited as evidence that there was a "leak" as to the Court's decision; but the letter itself proves the contrary, for its statement of the ground on which the Court would rest its decree was erroneous, and similarly inaccurate was the statement as to Judge Grier's dissent.

[1] *New York Tribune*, March 5, 9, 1857.

Owing to the illness of the Chief Justice, due to exposure at the Inauguration ceremonies, the decision was not rendered until Friday, March 6. On that day, Chief Justice Taney read the opinion of the Court, *Dred Scott* v. *Sandford*, 19 How. 393, and Judge Nelson and Judge Catron read separate opinions. "The delivery of Taney's opinion," said the *National Intelligencer*, "occupied about two hours, and was listened to with profound attention by a crowded Court-room; and whether as a decision of the Supreme Court, or for the constitutional arguments on which it stands, will work a powerful influence throughout the United States." On Saturday, March 7, Judges McLean and Curtis delivered their elaborate dissenting opinions, and separate opinions were read by Judges Daniel, Grier, Campbell and Wayne — "these opinions were listened to with eager interest and profound respect by the Court and Bar and a larger number than usual of attentive auditors." [1]

While pamphlet after pamphlet, article after article, by lawyers and laymen alike, poured forth from the press, at the time, regarding the legal points involved in the opinion of the Court and of the various Judges, at the present date the technicalities of the case are of no particular interest; and the interminable discussion as to whether the Court was justified in deciding on the merits of the case, after holding that the Circuit Court had no jurisdiction, is now of very slight interest. It will suffice to say that six of the Judges — Taney,

[1] *National Intelligencer*, March 7, 9, 1857; *New York Tribune*, March 7, 1857; for able discussions of the law, see *Legal Review of the Dred Scott Case*, by John Lowell and Horace Gray, *Law Reporter* (June, 1857), XX; *The Dred Scott Case*, by Timothy Farrar, *North Amer. Rev.* (Oct., 1857), LXXXV; for excellent descriptions of this case, see *Political History of Secession*, by Daniel W. Howe (1914); *Legal and Historical Status of the Dred Scott Case* (1909), by Elbert W. H. Ewing; see also *Note on the Dred Scott Case*, by Hampton L. Carson, *Amer. Law. Rev.* (1902), XXXVI; *Decisive Battles of the Law* (1907), by Frederick T. Hill.

Wayne, Catron, Daniel, Grier and Campbell — concurred in holding, not only that a negro could not be a citizen of the United States, but also that Congress had no power to exclude slavery from the Territories; Nelson confined himself to the opinion which he had prepared to be read as the opinion of the Court (before his Associates had decided to pass upon all the questions involved in the case), and decided only that the Court was bound to follow the law as laid down by the Missouri Supreme Court, with reference to the appellant's status as a slave; McLean and Curtis, in dissenting, delivered very long and elaborate opinions taking the contrary position on all three points involved.[1]

[1] The final outcome of the case so far as the appellant himself was concerned is curious. During the argument of the case, the fact became public (theretofore not generally known) that the negro was actually still owned by Mrs. Emerson, who had become the wife of Calvin C. Chaffee, an abolitionist Congressman from Massachusetts (see *New Hampshire Patriot*, June 3, 1857, stating that the *Springfield* (Ill.) *Argus* "first exposed this fact to the world"). The *New York Courier*, Dec. 19, 1856, stated that Sandford, the reputed owner of the negro, intended to liberate him, whatever might be the result of the suit. The *New York Tribune*, March 17, 1857, published a letter from Dr. Chaffee denying that he had any control over the negro or over the course of the suit. On April 23, 1857, the *Washington Union* said: "Dred Scott — This doughty gentleman of color has become the hero of the day, if not of the age. He has thrown Anthony Burns, Bully Bowlegs, Uncle Tom and Fred Douglass into temporary, if not everlasting oblivion, annihilated the Missouri Compromise and almost healed the wounds of bleeding Kansas." About the same time, a St. Louis paper described the negro as follows (see *Washington Union*, April 11, 1857): "The distinguished colored individual, who has made such a noise in the world in connexion with the celebrated case of *Scott* v. *Sandford* and who has become tangled up with the Missouri Compromise and other great subjects — Dred Scott — is a resident, not a citizen of St. Louis. He is well known to many of our citizens and may frequently be seen passing along Third Street. He is an old inhabitant, having come to this city thirty years ago. Dred Scott was born in Virginia where he belonged to Capt. Peter Blow, the father of Henry T. Blow and Taylor Blow of this city. . . . Dred was at Corpus Christi at the breaking out of the Mexican War, as the servant of Captain Bainbridge. On his return from Mexico, he applied to his mistress, Mrs. Emerson, then living near St. Louis, for the purchase of himself and family, offering to pay part of the money down and give an eminent citizen of St. Louis, an officer in the Army, as security for the payment of the remainder. His mistress refused his proposition. . . . The suit was commenced about ten years ago, and has cost Dred $500 in cash, besides labor to a nearly equal amount. It has given him a 'heap o' trouble', he says, and if he had known that 'it was gwine to last so long', he would not have brought it. . . . Dred does not appear to be at all discouraged by the issue of the celebrated case, although it dooms him to slavery. He talks about the affair with the ease of a

It is evident that the Judges did not realize, in the slightest degree, the effect which their decision was to have, or foresee the course which the public at the North would pursue towards it. "On the principles of the Dred Scott decision," wrote Alexander H. Stephens, five months later, "depended, in all probability the destiny of this country;" but he, like the Judges, supposed that the Court's decision would be accepted by the country. Other Democrats seemed to have a fatuous confidence in the Court's power thus to settle the slavery issue, expressed by Judge Wayne in his opinion as follows: "The case involves private rights and constitutional principles of the highest importance, about which there had become such a difference of opinion that the peace and harmony of the country required the settlement of them by judicial decision." No one on the Court comprehended the fact that the intensity of feeling at the North on the subject of slavery was such that it would not tolerate the settlement of the issue "by judicial decision"; and that such an attempt at settlement would only serve to enflame rather than to extinguish. The effect of the decision upon the country, and especially upon the North has been so frequently and fully described by historians that it would be a work of supererogation to detail it here.[1] The whirlwind of abuse which swept upon

veteran litigant, though not exactly in technical language and is hugely tickled at the idea of finding himself a personage of such importance. He does not take on airs, however, but laughs heartily when talking of 'de fuss dey made dar in Washington 'bout de ole nigger.' He is about fifty-five years old, we should think, though he does not know his own age." See also *Frank Leslie's Weekly*, IV, June 27, 1857, for detailed account of Dred Scott, with pictures of him and his wife and children.

In May, 1857, Dred Scott was conveyed by Dr. Chaffee and Mrs. Emerson to Taylor Blow of St. Louis for the purpose of emancipation, and he was set free in Missouri, within three months after the Court denied him to possess any rights as a free man.

[1] The views of the anti-slavery men in general, and the effect of the decision upon Northern sentiment, are well illustrated in the letters received by Judge McLean, highly praising his opinion. *John McLean Papers MSS;* letters of

the Court, the loss of confidence theretofore entertained in it, and the ensuing damage to its reputation, were, however, in reality, due more largely to misunderstandings of the decision, and to falsehoods spread relative to Taney's opinion, than to the actual decision itself. While the Court was bitterly assailed for rendering any decision upon the constitutional point, after holding that the Circuit Court had no jurisdiction, the correctness of its action in so doing was, after all, a purely legal question.[1] The most serious attacks upon the Court arose from a gross and willful perversion of a sentence in the Chief Justice's opinion, which certain violent anti-slavery papers of New York spread throughout the country, — the charge, reiterated again and again, that Taney had stated in his opinion that the "negro has no rights which the white man was bound to respect." These newspapers never printed the corrections of this false charge, immediately and persistently made by supporters of the Court, who pointed out that Taney had never stated this sentiment as expressing his own view, but had merely recited it historically as the view held by men in general, in the eighteenth century.[2] By the brazen propagation of this lie the country was long deceived; and the prejudices and passions aroused against the Court and its decision were due far more to Taney's alleged statement than to the point of law decided by him. It was not until the

J. H. Martindale of New York, March 21, John Allison of Ohio, March 21, Oliver H. Browning of Illinois, March 23, Jacob Collamer of Vermont, April 1, C. C. Bradley of Vermont, April 20, 1857.

[1] The Washington correspondent of the *New York Courier* wrote, March 12, 1857 (see issue of March 16): "I discover that lawyers are disposed to take a very practical and professional view. . . . They say there was but one point decided, namely that of the citizenship of the colored man. Beyond that, all is 'leather and prunella.' . . . The stump speech of the Chief Justice was entirely gratuitous, without one particle of authority."

[2] See example of correction of this falsehood, *Ohio Statesman*, May 13, 1857. "Republican Lie No. 1."

year 1886 that the *Independent*, of New York, which had been the chief offender in spreading the falsehood, recanted and said: "It is but just to the memory of Chief Justice Taney, as well as to the Supreme Court, to note the fact that the whole language, including these words, is simply that of historical narration. . . . Chief Justice Taney did not say it in 1857, and the Supreme Court did not say it. What Chief Justice Taney said was by way of narrative, relating to a period prior to the adoption of the Constitution." [1]

The manner in which the sentiment of the country was aroused by the Northern press may be gathered from a few fairly illustrative extracts from the most influential anti-slavery papers. Immediately after the decision, the *New York Tribune* commenced an onslaught, which it continued practically every day for a month.[2] On March 6, its Washington correspondent wrote that: "The whole slavery agitation was reopened by the proceedings in the Supreme Court today, and that tribunal voluntarily introduced itself into the political arena. . . . Much feeling is excited by this decree, and the opinion is freely expressed that a new element of sectional strife has been wantonly imposed upon the country." The next day, he wrote that its character as an impartial judicial body had gone. "If the action of the Court in this case has been atrocious, the manner of it has been no better. The Court has rushed into politics, voluntarily and without other purpose than to subserve the cause of slavery. They were not called upon, in the discharge of their duties, to say a word about the subject. . . . The vote stood seven to two — the five slaveholders and two

[1] *Independent*, April 3, 1886.

[2] See *New York Tribune*, especially March 7, 9, 10, 11, 12, 16, 17, 19, 20, 21, 25, 1857.

doughfaces making up the seven. Their cunning chief had led the van, and plank by plank laid down a platform of historical falsehood and gross assumption, and thereon they all stood exultingly, thinking, or feigning to think, that their work would stand during the remainder of their lives at least." Another correspondent wrote that the decision "has been heard and commented upon here with mingled derision and contempt. If epithets and denunciation could sink a judicial body, the Supreme Court of the United States would never be heard of again. Chief Justice Taney's opinion was long, elaborate, able and Jesuitical. His arguments were based on gross historical falsehoods and bold assumptions and went the whole length of the Southern doctrine." Editorially, the *Tribune* said that: "The long trumpeted decision . . . having been held over from last year in order not too flagrantly to alarm and exasperate the Free States on the eve of an important Presidential election, . . . is entitled to just so much moral weight as would be the judgment of a majority of those congregated in any Washington bar-room. It is a *dictum* prescribed by the stump to the Bench." Three days later, it said: "No wonder that the Chief Justice should have sunk his voice to a whisper, conscious, as he must have been, that the decision which he promulgated had been arrived at on grounds totally different from those indicated in the opinion — that opinion being but a mere collation of false statements and shallow sophistries, got together to sustain a foregone conclusion, — knowing that he was engaged in a pitiful attempt to impose upon the public. However feeble his voice might have been, what he had to say was still feebler." The next day, it said: "Until that remote period when different Judges sitting in this same Court shall reverse this wicked and false judgment, the Con-

stitution of the United States is nothing better than the bulwark of inhumanity and oppression." Equal with the *Tribune* in its influence on the anti-slavery sentiment of the North was the *New York Independent*, which reached the great Congregationalist community, and whose columns were filled with invective against the Court.[1] On the day after the decision, its Washington correspondent wrote: "If there be not aroused a spirit of resistance and indignation, which shall wipe out this decision and all its results, as the lightning wipes out the object it falls upon, then indeed are the days of our Republic numbered, and the patriot shall see light only beyond the storms of revolution and blood. . . . The Missouri Compromise was a defeat of freedom. The Compromise of 1850 was a yet more humiliating surrender; but it was left to the Supreme Court to complete the utter subjugation and extermination of all that remained of the protesting voice of liberty. . . . In all this, I counsel no revolutions. . . . I invoke only in the name of Truth, which yet lives, that force of public sentiment which makes and unmakes Courts and decisions, as easily as it makes and unmakes Presidents and Legislatures. . . ." Editorially, it inveighed against Taney's "stump speech spoken for political effect" and the wickedness of the decision — the attempt "to foist this new and atrocious doctrine into the Constitution"; "this vain attempt to change the law by the power of Judges who have achieved only their own infamy." It said that: "The reverence for the Supreme Court, which has been so widely cherished, is a reverence for law. It is a reverence which assumes that the Judges of a tribunal, so far removed from the shifting winds of popular excitement, and so carefully guarded against the intrusion of

[1] *Independent*, March 12, 19, 26, Dec. 17, 1857.

factions and political influences, will be under no violent temptation to betray their trust"; and that the Judges now having debased themselves, the question had arisen as to whether Judges ought not to be chosen by popular election. Later, in an editorial headed, "The Decision of the Supreme Court is the Moral Assassination of a Race and Cannot be Obeyed", it said: "The moment the Supreme Judicial Court becomes a Court of injustice, a Court to carry schemes of oppression against classes of men, by forced constructions of the Constitution, that moment its claim to obedience ceases. The moment it becomes the Court of a political party, and not of the United States, and promulgates falsehoods, that moment its decisions cease to be binding, and impeachment, not obedience, belongs to it. . . . The decision is a deliberate iniquity. It is not a mistake . . . but it is a deliberate, willful perversion, for a particular purpose, and that purpose, the sanction and perpetuity of human slavery. If the people obey this decision, they disobey God." The *New York Evening Post* said that the consequences of the decision "are beyond the reach of human calculation", and that "the moral authority and consequent usefulness of that tribunal, under the present organization, is seriously impaired, if not destroyed. . . . A majority of its members have consented to become parties to a combination with the Administration to transfer the political control of the government to the hands of the slave oligarchy."[1] The *New York Courier* published a series of attacks, but of a less extreme character.[2] On the day after the decision, its owner, General Webb, wrote from Washington of the "sectional mummeries of

[1] *New York Evening Post*, March 7, 10, 11, 12, 13, 14, 26, 1857.

[2] *New York Courier*, see editorials and letters from Washington by its owner, Gen. James Watson Webb, and by "Inspector", March 7, 9, 10, 11, 12, 13, 16, 17, 19, 1857.

st Court which had become a mere party machine", and said that while all good citizens would submit to the decision, yet Congress and the people must prevail. Later, he wrote that the Court, which had been hitherto "considered the mainstay of order and conservatism in the country, has been seized by an unreasoning and desperate fanaticism on one subject, which renders it blind to precedents, to the well-established principles of law, to justice and humanity"; and that henceforward it could never be spoken of "with that veneration and respect which the Nation has delighted to accord it." On March 11, the *Courier* said that the South would find no benefit from the decision which would only multiply agitation on the slavery question. "The volunteered, sectional and partisan opinions . . . are in all respects unfortunate — unfortunate for the reputation and authority of the Court — unfortunate for the harmonious relations of the Free and Slave States — and unfortunate for the character of the country . . . fraught with immense mischief." On March 12, it expressed a fear lest the Free States should assert their sovereignty to the extremest limit, and said that if this injured the Slave States, the latter "will only have slavery-devoted and innovating Judges to thank for it." On March 13, it urged that the composition of the Court and the Circuits be remodeled. After pointing out the great preponderance of white persons in the four Free-soil Circuits as compared with the five Slavery Circuits, it said: "In its present sectional form, it is necessarily the object of suspicion. To believe implicitly in its perfect candor and impartiality of judgment upon questions of a sectional bearing requires an effort, which, however the heart in its charity might allow, the understanding, with its appreciation of human nature as it is, utterly refuses. Among a free

people, the authority of a tribunal of law resides more irt its moral power than in the civil force which stands at its back, and the very first requisite to the possession of this moral power is complete confidence in its impartiality."

The anti-slavery press throughout the North and Central West followed the example of these leading New York papers and indulged in even greater scurrility and abuse.

In most histories of the period, the effect of the Dred Scott decision has been portrayed in a somewhat disproportionate and exaggerated manner by omitting reference to the large body of newspapers which supported or defended the decision. Moreover, some papers like the *Times*, *Herald*, *Commercial Advertiser* and *Journal of Commerce*, in New York, took a conservative stand; and while impressed with the seriousness of the issue thrust upon the country by the Court's decision, they deplored the violence of the *Tribune* and its imitators.[1] The *Times* said, March 8, that while all looked with respect and some degree of reverence on the Court, "the circumstances attending the present decision have done much to divest it of moral influence and to impair the confidence of the country. . . . Among jurists, it is not considered to settle anything more than the denial of jurisdiction. . . . But it exhibited the eagerness of the majority of that tribunal to force an opinion upon the country and to thrust itself into the political contests." The next day, it said that while there would be no forcible opposition, the doctrines of the decision would germinate "the seeds of discontent and contest and disaster hereafter. . . . It has laid the only solid foundation which has ever yet

[1] *New York Times*, March 8, 9, 1857; *New York Herald*, March 7, 8, 12, 13, 14, 15, 17, 1857; *New York Journal of Commerce*, March 11, 12, 1857.

existed for an Abolition Party, and it will do more to stimulate the growth of such a party than has been done by any other event." The *Herald* said, March 7, that the decision would be accepted as the law, but "it will profoundly affect the public mind in regard to the general question of slavery." The next day, it termed the decision a "bombshell from the Supreme Court", which, "of vital importance . . . at a single blow shivers the anti-slavery platform of the late great Northern Republican party into atoms. . . . The supreme law is expounded by the supreme authority, and disobedience is rebellion, treason and revolution." Later, it said that some of the anti-slavery journals, "stunned by these late tremendous blows from the Supreme Court, are counseling an organized resistance. But that is folly, treason and rebellion." And it stated that one of the inevitable party issues, on which every Presidential contest would turn, would henceforward be — the reformation of the Supreme Court, so as to reverse the majority. The *New York Commercial Advertiser* very candidly said that, while it dissented from the opinion, "no one had a right to impugn the motives of the Court, and to do so is alike unjust and unwise. Least of all is it patriotic to endeavor to bring the highest tribunal of the republic into contempt, because it pronounced decisions at variance with our views or wishes. Such a course, though it may be congenial with our temper at the moment, is sadly perilous to the common weal, the interest of freedom and free government being always best upheld by maintaining respect for the officers of the government, especially those of the Judiciary." The *New York Journal of Commerce*, a strong Democratic paper, attacked the "indecent and contemptible calumnies" of the abolition press, and deplored the impugning of the "honesty and purity of

the great constitutional lawyers" on the Bench. It stated that "outside the limited circle of disappointed factionists, whose vocation it is to foment strife and discord to subserve individual and selfish ends", the decision would be respected, honored and obeyed; and that this "authoritative and final settlement of the grievous sectional issues" would be hailed with satisfaction by all, "except the demagogues who wish to kindle flames of discord and fanaticism."

Other Democratic papers in the North were vigorous in support of the decision, and deplored the virulence of the "Black Republican press, brimful of elements of sedition, treason and insurrection."[1] "The *Tribune* may rave, and fanaticism make earth hideous with its howlings, but all in vain," said the *Pennsylvanian*. "There are certain points which are settled and beyond the reach of the fanatics of the Nation. . . . The decision is a closing and clinching confirmation of the settlement of the issue. . . . Whoever now seeks to revive sectionalism arrays himself against the Constitution, and consequently against the Union." A leading New Hampshire paper said: "The black press and pulpit unite in reviling the Court and denouncing this decision. . . . The Black Republicans' creed and purposes are at war with the Constitution, are treasonable, and contemplate the overthrow of the Union. . . . Let the patriotic of all parties think of the immense consequence of this Court to our National peace and harmony, and put the seal of reprobation on those who would destroy it or lessen its authority. The reflecting will be astonished at the language of the

[1] See, for example, *Pennsylvanian*, March 10, 11, 12, 1857; *New Hampshire Patriot*, March 18, 25, June 3, 1857; *Milwaukee Daily News* (Wisc.); *Rock Island Argus* (Ill.); *Springfield State Register* (Ill.); *Detroit Free Press* (Mich.); *Portland Eastern Argus* (Me.); *Missouri Republican*, quoted in *Washington Union*, April 7, 14, 16, May 1, 1857; *Ohio Statesman*, March 19, 23, May 13, 14, 15, 1857.

press as to the tribunal which has performed such priceless service, and given so much stability to law and strength to our National politics." "Pernicious and anarchical as have hitherto been the 'higher law' heresies," said the *Boston Post*, "we hazard nothing in saying that none have been more pernicious or full of anarchy than those which a few days have elicited as to the Supreme Court." A prominent Illinois paper said that: "No decision for a generation has created a deeper sensation. . . . This inquisition, blind and mad as it is, which has foisted itself into the pulpit and the forum, may be soon expected to sit with veiled face, in mocking of common sense and common decency, upon the last relic of constitutional liberty. A blow aimed at the third great branch of the government — the Judiciary — is tantamount to a blow struck at the heart of all law and order." A leading Ohio paper denounced the Republican papers for their attack on Taney, "this venerable father in the law, strong in mind but weak in body, tottering on the brink of an honored grave, with no fame to expect but that which erudition and judicial ability have already obtained for him", and for their attempt to destroy confidence in the Court. "This bulwark of self-imposed law is in the hearts of the people. To teach the people to laugh it to scorn is to weaken the bastions and mine the fortress."

The strongest defense of the Court appeared in a long series of editorials, during April and May, in the Administration paper, the *Daily Union*, of Washington. On the day after the decision, it said that it would "exert the most powerful and salutary influence throughout the United States"; on March 11, it said: "If the sectional question be not now settled, then we may despair of the Republic. We believe it is settled, and that henceforth sectionalism will cease to be a

dangerous element in our political contests. . . . Of course, it is to be expected that fanaticism will rave and clamor against the decision of the Supreme Court. But fanaticism ceases to be a formidable enemy, when it seeks to measure strength with the Union-loving spirit of the people, sustained or confirmed by the great arbiter of constitutional questions." The next day, it said that it was confident that Taney's opinion "will be regarded with soberness and not with passion; and that it will thereby exert a mighty influence in diffusing sound opinions and restoring harmony and fraternal concord throughout the country." It deplored the "unbridled license of the press, and the vilification by Northern papers, and reciprocation by radical Southern papers." "There must be toleration, there must be forbearance," it concluded. Neither toleration nor forbearance, however, seemed possible, in the existing bitterness of the political situation — and the *Union's* later editorials gave increasing evidence of this.[1] On March 18, it spoke of the "ribald vituperations against the Court which made infamous some of the Republican journals." On March 26, in an editorial entitled the "Black Republican Crusade", it pointed out the necessity of retaining respect for, and confidence in, the Court — a doctrine which it said, had long been preached heretofore in the North; and it asked: "Is the whole structure of our government to be subverted, because a negro is determined by the highest judicial authority of the land not to be a citizen within the meaning of the Constitution?" On April 11, in an editorial entitled "The Higher Law Against the Con-

[1] See *Daily Union*, March 14, 17, 1857, saying that the "Black Republican press literally howl with rage . . . the vile epithets, reproaches in the treasonable calumnious papers of the North"; March 21, 1857, defending the Judges from the charges of acting politically; March 28, editorial on "the Supreme Court and the *New York Tribune*"; April 2, editorial on "What Courts Decide"; May 1, editorial on "The Supremacy of the Law."

stitution", it stated that there was now but one alternative — "obedience to the Constitution, or resistance to the supreme law of the land." A few papers expressed more calm and patriotic views. The *National Intelligencer* said, on May 29: "That the Supreme Court should have been called at all to pronounce upon questions involved in political controversy must be a matter of regret to all who would desire to preserve that high tribunal, not only from the influence of partisan bias in pronouncing its decisions, but from even the suspicion of it, on the part of any considerable portion of the community. . . . Whatever its decision might have been, it became inevitable, under these circumstances, that one political party or another, according to the views or prejudices of its members, was destined to be dissatisfied with the result; but the duty of acquiescing in that result, whether equally acknowledged by both parties or not, was equally imperative on both, and must remain so, as long as the forms of law receive that respect to which they are entitled." And *Harper's Weekly* said with great sanity: "The idea that any decision of the Supreme Court can reëstablish slavery in the Free States is a bugbear — an absurdity. The only result, therefore, that we can arrive at is, that, however repugnant the Dred Scott decision may be to the feelings of a portion of the Northern States, it can have no practical effects injurious to our tranquillity or to our institutions. The subject of slavery will be left to be decided, as it ultimately must be, by the laws which govern labor and production. It is, indeed, most devoutly to be desired that this great question should be left to be determined exclusively by those laws, free from the interference of the hotheads of the press and of the pulpit. If we would but permit Nature to have her own way for only a few short years!

. . . When political agitation shall have ceased, and the fires of religious fanaticism are burned out, these are the points on which this matter must ultimately be determined. . . . We have no doubt how it will finally be decided; nor have we any doubt how it would have been decided, years ago, if every agency that human wit can devise had not been systematically employed, at once to excite the passions, and blind the judgment of those to whom alone the disposition of the question rightfully belongs." [1]

Had the country been influenced by editorials like these, rather than by the hysterical, virulent and false outpourings of the *Tribune* and the *Independent*, the Court's action would have had less effect upon history, but it was otherwise destined. The surprise with which the attitude of the Republican press was greeted by the Democrats shows conclusively how little they realized the insidious effect upon public sentiment at the North produced by the undermining campaign against the Court which had been conducted by the anti-slavery leaders in Congress for the past seven years. And how little Chief Justice Taney himself realized the extent of the passions aroused by his opinion was seen in a letter written to Ex-President Pierce, August 29, 1857: [2]

You see I am passing through conflict, much like the one which followed the removal of the deposits, and the war is waged upon me in the same spirit and by many of the same men who distinguished themselves on that occasion by the unscrupulous means to which they resorted. At my time of life when my end must be near, I should have rejoiced to find that the irritating strifes of this world were over, and that I was about to depart in peace with all men and all men in peace with me. Yet perhaps it is best as it is. The mind

[1] *National Intelligencer*, May 29, 1857; *Harper's Weekly*, March 28, 1857.
[2] See *Amer. Hist. Rev.* (1904), X.

is less apt to feel the torpor of age when it is thus forced into action by public duties. And I have an abiding confidence that this act of my judicial life will stand the test of time and the sober judgment of the country, as well as the political act of which I have spoken. Your successor has, I think, a difficult time before him. Symptoms of discord are already appearing.

While, with the lapse of time, the opinion expressed by many earlier historians and statesmen that the Dred Scott decision was the most potent factor in bringing on the Civil War has been rejected, and the inevitability of that conflict has been realized, the really serious effect of this fatal decision by the Court was that which was foretold by a writer in the *North American Review*, as early as October, 1857: "The country will feel the consequences of the decision more deeply and more permanently, in the loss of confidence in the sound judicial integrity and strictly legal character of their tribunals, than in anything beside; and this, perhaps, may well be accounted the greatest political calamity which this country, under our forms of government, could sustain." [1]

And this view of the case, which will be the probable final judgment of history, has been recently well expressed by a thoughtful jurist as follows: "The Dred Scott decision cannot be, with accuracy, written down as a usurpation, but it can and must be written down as a gross abuse of trust by the body which rendered it. The results from that abuse of trust were, moreover, momentous. During neither the Civil War nor the period of Reconstruction did the Supreme Court play anything like its due rôle of supervision, with the result

[1] *The Dred Scott Case*, by Timothy Farrar, *North Amer. Rev.* (1857), LXXXV; see also *Parties and Slavery* (1906), by Theodore Clarke Smith, 208: "The only results of the *Dred Scott Case* were to damage the prestige of the Court in the North, and to stimulate a sectional hostility which threatened to recoil upon the Judges themselves."

that during the one period the military powers of the President underwent undue expansion, and during the other the legislative powers of Congress. The Court itself was conscious of its weakness, yet notwithstanding its prudent disposition to remain in the background, at no time since Jefferson's first Administration has its independence been in greater jeopardy than in the decade between 1860 and 1870. So slow and laborious was its task of recuperating its shattered reputation." [1]

It must be again emphasized, however, that the loss of confidence in the Court was due not merely to the Court's decision but to the false and malignant criticisms and portrayals of the Court which were spread widely through the North by influential newspapers, and of which no better illustration can be given than to quote in full the clever, but venomous, description of the members of the Court sent out by the *Tribune's* correspondent, ten days after the decision.[2]

"Mr. Wayne is an intelligent, prompt, good looking Georgian. He is radical on the slavery question, and would dispute the right of any Northern man to have an opinion on slavery or its relations, anyway. He entered with alacrity and vim into Judge Taney's views, and would stand by them, and either argue for them or fight for them, according to the necessities of the case. He is one of the Chivalry, and before he got old, the ladies used to be enamored of his flowing locks and general beauty of appearance, to which he was himself not wholly insensible. He was very much exercised in mind, during the delivery of Judge Curtis'

[1] *The Dred Scott Decision in the Light of Contemporary Legal Doctrine*, by Edward S. Corwin, *Amer. Hist. Rev.* (1911), XVII; *The Doctrine of Judicial Review* (1914), by Edward S. Corwin; *Note on the Dred Scott Case*, by Hampton L. Carson, *Amer. Law Rev.* (1902), XXXVI; *The Dred Scott Case in the Light of Later Events*, by Morris M. Cohn, *ibid.* (1912), XLVI; *Did the Decision in the Dred Scott Case Lead to the Civil War?* by Henry A. Forster, *ibid.* (1918), LII.

[2] *New York Tribune*, March 17, 1857.

opinion, and could not restrain the exhibition of his feelings. . . . He commented audibly, both to the Chief Justice, and to Judge Daniel who sat on either side of him. In fact, both he and the veteran Daniel seemed as uneasy, while Judge Curtis was reading, as though they were listening to an Abolition harangue.

"Judge Daniel of Virginia is old, and long, and lean, and sharp in the visage, and simply wears the aspect of a tremulous and fidgety old gentleman in glasses. His politics are those of a Virginia slaveholder and abstractionist, who swears by the resolutions of '98. Of course, he goes to the hilt on any point where the demands of the Oligarchy are concerned.

"Judge Catron of Tennessee is a robust, unintellectual man, advanced in years, whose judgments would be inevitably swayed by his political associations, but whose erroneous opinions would, as a general rule, more often result from obtuseness than from original sin. . . . He listened with a good deal of respectful surprise to Judge Curtis' exposition of the fallacy of his deductions. . . .

"Of Judge Campbell of Alabama, there is nothing to be said, except that on the subject in question he is more fanatical than the fanatics, more Southern than the extreme South from which he comes. A judicial . . . decision from him, where slavery is concerned, is of no more value than the cawing of a raven. He is a middle-aged, middle-sized man, bald, and possessed of middling talents.

"Grier of Pennsylvania followed his instincts and not his convictions, if a man may be said to have convictions who has not moral stamina enough to distinctly avow his real opinions. Grier is a man somewhat misunderstood. He is not what we fancy he is generally considered to be, a perverse, iron-sided, hard-shelled,

soulless, pro-slavery, old curmudgeon. If anyone entertains this uncharitable opinion of Grier, we must beg to undeceive him. He is no such man. In the first place, the Judge is a blonde, of rotund figure. This alone intimates a denial of the character suggested, and the Judge's real characteristics closely conform to his external, physiological delineations. He is of a soft and rosy nature. He is facile and easy of suggestion. He succumbs under touch, and returns into shape on its removal. He is ardent and impressible. He is fickle and uncertain. . . . He is impulsive and precipitate. Let Grier associate with none but honest men, and be placed in no difficult or constraining circumstances, and he would not disgrace himself or his position. We concede to Mr. Grier another merit. If he belonged to a Black Republican Court, he would side with the majority.

". . . Of Nelson, it is needless to say more than that he is a New York Democrat of the perishing school. He hesitated to go with the Southern Judges in their revolutionary opinions, yet he had not sufficient virtue to boldly stand up against their heresies.

". . . Of Taney's opinion, it will be found to exhibit all the characteristics that have marked his career. It is subtle, ingenious, sophistical and false. It is the plea of a tricky lawyer and not the decree of an upright Judge. It is a singular, but not wonderful fact in nature, that the body to some extent intimates the character of the soul that inhabits it. This is the case with Judge Taney. He walks with inverted and hesitating steps. His forehead is contracted, his eye sunken and his visage has a sinister expression."

Such ridicule and abuse, published and republished and quoted by other newspapers throughout the Northern States, could not fail to weaken the Court's status with the people.

CHAPTER TWENTY-SEVEN

THE BOOTH CASE, AND CONGRESSIONAL ATTACKS

1858–1860

SHORTLY after the delivery of the Dred Scott decision and the adjournment of the Court on March 7, 1857, Judge Curtis determined to resign. While reaching this conclusion primarily because of the inadequacy of the salary, he was also influenced by his belief, regretfully held, that he could no longer expect to see the Court act on constitutional questions, with freedom from political considerations.[1] When this

[1] *Curtis*, I, 245, letter from G. T. Curtis, July 3, 1857. Considerable friction had arisen between the members of the Court, over the fact that Judges Curtis and McLean had filed with the Clerk, on March 9, their full opinions, which had been printed and widely circulated throughout the North, before Taney had filed the opinion of the Court, and before the other Judges had filed their separate opinions. An acrimonious correspondence on the subject ensued between Taney and Curtis; see *Curtis*, I, 211–230; on April 2, 1857, the *National Intelligencer* reprinted a letter from the Washington correspondent of the *New York Journal of Commerce*, dated March 28: "I called at the Clerk's office of the Supreme Court just now and ascertained that there is no mode of procuring official copies or any copies of the opinions of the Court in the Dred Scott case, until the Reporter of the Court, Mr. Howard, shall have them printed in his series of reports. The volume which is to contain them is nearly ready, and is only delayed until he can obtain the revised copies of the opinion. The opinion of the Court, as read by the Chief Justice, is not yet on file; but he expected to be ready to file it today. There will be no delay, or very little, about the others. The opinions of Justices McLean and Curtis were filed on the 9th. . . . These have been published at the North. The abstracts published of Chief Justice Taney's and Justice Nelson's opinions were taken in shorthand, and of course are imperfect." From an interesting, confidential letter written by a friend, James E. Harvey, to Judge McLean, April 3, it appears that various Judges modified the form of their opinions after their oral delivery. Harvey wrote: "There are strong surmises about the manipulations to which the majority opinions have been subjected. As the Appletons wrote to me to get them all for publication, I took some pains to inform myself about their status — if you allow that word, when not applied to slavery. Last week, they had not been filed and were inaccessible. Taney's had been twice copied for revision, and an application from the *Intelligencer* to publish was refused, owing to non-completion. That clause in Catron's, rebuking the discussion of the

resignation was presented on September 1, 1857, the news was received by the Bar of the North with the deepest regret.[1] Ex-President Fillmore wrote to him that his appointment was one "to which I and my friends could always point with proud satisfaction", and that he regarded the resignation as "a calamity" which he feared would "not only impair the confidence of all good and intelligent men in the stability of our institutions, but that the appointment of a successor may be most unfortunate. . . . You may know who will probably be selected, but I confess, I fear the worst." All of Curtis' Associates on the Bench (with the exception of Judge Daniel) sent letters of deep regret, though that of the Chief Justice was somewhat perfunctory. Judge McLean wrote despondingly that the loss was irreparable, and that while, in 1830 when he took his seat, the "Court commanded the respect and veneration of the country, it can never hope to regain so elevated a position in the future", and that he had "lost the interest and pride I once felt in the tribunal." Some old-line Whigs felt that Curtis should have sacrificed his personal feeling and remained on the Bench, rather than create a vacancy at this time. "How could so wise a man as our friend B. R. Curtis do so deplorable a thing as to resign . . . at this untimely moment?" wrote Robert C. Winthrop of Massachusetts, the former Speaker of the House of Representatives. "I may over-estimate the impor-

merits of the case after the denial of jurisdiction, has been expurgated. But a single copy was printed for his own use. Campbell's has been printed privately, but not for circulation. He forbade the printer from showing it to anybody." *John McLean Papers MSS.* The opinions were not officially published until the end of May, the *National Intelligencer* printing them first, on May 29.

[1] Curtis' opinion entirely revolutionized the former adverse views held regarding him by the anti-slavery men. An interesting example of their attitude is seen in a letter from Henry L. Higginson, in May, 1857: "Judge Taney's decision is infamous to the last degree. Ben Curtis for once has been honest." *Life and Letters of Henry Lee Higginson* (1921), by Bliss Perry, 110.

tance of his course, and I certainly esteem and respect him, but I have never known a resignation which has so much the air of desertion. Buchanan will have a chance to make the Court still less acceptable to this part of the country." [1]

The intensity of bitterness aroused against the Court in the North was well illustrated by the savage, unjust and untrue attacks which were made upon the man whom Buchanan now chose to fill the vacancy caused by the resignation of Judge Curtis. The President had at first been inclined to appoint Isaac Toucey of Connecticut, formerly United States Attorney-General; he had also even considered going outside the Circuit and appointing a Southerner, William L. Yancey of Alabama. Rufus Choate of Massachusetts had strong supporters; John J. Gilchrist of New Hampshire, who had formerly been Chief Justice of that State and was now Chief Justice of the new United States Court of Claims, was recommended by Choate himself, and by Reverdy Johnson and Charles O'Conor.[2] Buchanan finally determined on Nathan Clifford of Maine, and submitted his name to the Senate on December 9, 1857. Clifford was fifty-four years of age, and had served as Attorney-General, both of his State, and of the United States (under Polk). As his later career showed, he was amply qualified as a lawyer of great learning and powers of research. The moment, however, the nomination reached the Senate, it was subjected to the most venomous criticism by the radical anti-slavery men, particularly by John P. Hale,

[1] *Memoir of Robert C. Winthrop* (1897), by Robert C. Winthrop, Jr.

[2] See letter of Howell Cobb to Alexander H. Stephens, Sept. 22, 1857, *Amer. Hist. Ass. Rep.* (1911), I, 422; letters of J. J. Gilchrist to Pierce, Sept. 16, 1857, Cushing to Pierce, Oct. 2, 1857, *Franklin Pierce Papers MSS;* Richard K. Crallé wrote to R. M. T. Hunter, Oct. 24, 1857, that "I suppose the rumored transfer of Yancey to the Supreme Court Bench is to deprive you of all Cabinet connections." *Correspondence of R. M. T. Hunter, Amer. Hist. Ass. Rep.* (1916), II.

Senator from New Hampshire. The *New York Tribune's* Washington correspondent wrote that: "The President has determined to break down all exclusive privileges and monopolies, as anti-Democratic; and therefore, as New England has had Story and Curtis, upon which they have grown rather presumptuous, he has determined to bring them down to the level of the other Circuits and appoint Clifford. However, Clifford will be confirmed under party drill, although it is well known that the entire Bar of New England has protested against it as an outrage. Thus the process of deterioration goes on, and the Supreme Court is gradually becoming a mere party machine, to do the bidding of the dominant faction and to supply places to reward party hacks." [1] This statement that the entire Bar of New England had protested had no foundation; but it is true that there was considerable opposition, based largely on personal grounds. On January 12, 1858, nevertheless, the Senate confirmed the appointment by the close vote of twenty-six to twenty-three.[2] "Mr. Clifford owes this appointment exclusively to his party associations, unsupported by the wishes or recommendation of the Bar of his Circuit. His sympathies coincide entirely with those which the Court have manifested, and bring the strength of his vote to the sectional action of the Court, without any independence or great legal ability," said the *New York Evening Post.* "There is perhaps some satisfaction in the belief, which this appointment strengthens, that the weakness and evident character

[1] See *New York Tribune,* Dec. 18, 29, 1857, Jan. 13, 14, 16, 1858.

[2] The *New York Evening Post,* Jan. 14, 15, 1858, said that the defeat of Clifford's nomination had been thought certain, but that by reason of the absence of two of his opponents, Senators Charles Sumner and Simon Cameron, and the change of mind of Senator Allen of Rhode Island, he was confirmed. "The result is sufficiently to be regretted, but the negligence through which it was achieved is deplorable, and occasions great mortification, not unmixed with vexation."

of the Court, together with the inequality of its composition, will produce an entire remodelling of it;" and the *New York Tribune* also continued its attack: "On the principle which seems to have governed the selection of Mr. Clifford, that the proper business of the Northern minority on the Bench is merely to fall in with and say yes to any extravagances which the Southern majority may choose to promulgate, Mr. Clifford is admirably fitted for the place in which he has been put. We may be quite sure that he will never be driven, by his knowledge of the law and history or his logical perception of things, into playing the marplot, as Judge Curtis did in the *Dred Scott Case*, tumbling down the decision of the Court about its ears, and exposing that grave tribunal to popular derision and even contempt." To these partisan diatribes, Judge Clifford's distinguished judicial service of twenty-three years, until his death in 1881, afforded a complete refutal.

When the Court met for its December Term at the end of the year 1857, the newly elected Congress was being confronted with the slavery question in its most inflamed condition. The wrongs of "bleeding Kansas", the question of the admission of that Territory as a State, the question of the legality of its two Constitutions — one framed by slavery men at Lecompton, the other by anti-slavery men at Topeka — were all the subject of long and violent debates, which lasted through the sessions of 1858, 1859 and 1860. In addition, in 1859, the John Brown-Harper's Ferry episode elicited passionate speeches on this unescapable question. In all these debates, covering hundreds of pages of the *Congressional Globe*, the opinions of the Court in the *Dred Scott Case*, and the action of Chief Justice Taney and the other Judges formed a con-

stant staple for assault and defense. Interminable discussions arose, also, as to the legal points involved in the case, and as to the applicability of the decision to the point at issue in Kansas — the right of a Territory to legislate on the subject of slavery. Few of these details are of interest now, but in the three years prior to the Civil War they formed the chief, almost the only, subject of concern in Congress; and the debates, centering as they did around the Court, had a most demoralizing effect upon the attitude of the general public towards the Judiciary. Illustrative of the general Republican attitude in the Senate were the speeches of Hale of New Hampshire, Trumbull of Illinois, Fessenden of Maine, Doolittle of Wisconsin, Collamer of Vermont, Seward of New York, Hamlin of Maine, and Wade of Ohio.[1] A few of their sentiments were as follows. Hale said that he had practically lost all respect for the Court since they had "come down from their place and thrown themselves into the political arena", and "when the excitement has passed away, the record of this decision will stand, not a monument to the wisdom or to the integrity of the Court, but it will stand as one of those unfortunate decisions which Courts have frequently made, when they have undertaken to mold eternal principles of justice and law to suit the purposes of power. . . . I denounce that opinion on every occasion. I invoke the public indignation upon it." Trumbull said that, by trying by *dicta* to settle points not before it, the

[1] *35th Cong., 1st Sess.* and *App.*, speeches in 1858, of Hale, Jan. 18, 20, Trumbull, Feb. 2, March 17, Fessenden, Feb. 8, Collamer, March 2, Wade, March 13, Hamlin, March 9, Seward, March 3; in 1859, of Hale, Feb. 23, Pugh, Jan. 3, Feb. 23, Chandler, Feb. 17; in 1860, of Doolittle, Jan. 3; see also in the House in 1858, speeches of Washburn, Jan. 7, Giddings, Jan. 18, Foster, March 10, Abbott, March 23, Olin, March 29, Tappan, March 31, Walton, March 31, Bliss, May 6; in 1859, speeches of Davies, Feb. 11, Bingham, Feb. 11, Granger, Feb. 17, Brown, Feb. 17; in 1860, speeches of Foster, Jan. 12, Gooch, May 3, Washburn, May 19.

Court "was a set of usurpers." Fessenden cited with approval a recent case in the Supreme Court of Georgia,[1] in which that Court had stated that it was not bound by decisions of the United States Supreme Court, especially partisan opinions — a doctrine which, be it noted, the Northern Whigs of former days had vigorously denounced. The most violent assaults, however, were made by Seward, Hamlin and Wade. Seward, in an elaborate and picturesque but venomous speech, made the direct charge that the *Dred Scott Case* was a dummy suit, manufactured by Buchanan and the slavery interests for their own purposes, that the argument was a "mock debate", that Buchanan and the Chief Justice had acted in collusion to cheat the country, and that the decision was the result of a political bargain between the Court and the President, who "alike forgot that judicial usurpation is more odious and intolerable, than any other among the manifold practices of tyranny."

It is evident that not one of these slanderous assertions was true; they were made, as Senator Judah P. Benjamin said in his eloquent reply, "without proof of a solitary fact, without the assertion even of a fact, on which to base the foul charge."[2] And the actual history of the case, its date of origin, the par-

[1] *Padelford* v. *Savannah* (1854,) 14 Ga. 438.

[2] Tyler, in his *Memoir of Roger Brooke Taney* (1872), 380–390, discussed at length Seward's attack and said: "This bungling sketch of an historical scene, by unskilful literary ambition is an unmitigated calumny from beginning to end"; and he published letters to him from Judge Campbell, Judge Nelson and Reverdy Johnson to disprove Seward's statements.

For Seward's charge, see *35th Cong., 1st Sess.*, 943. Prof. John W. Burgess in *The Middle Period* (1897), 457, said: "It is almost certain that the charge was an unfounded suspicion. The prevalence of the suspicion was, however, an ominous sign of the danger impending over the land. . . . Both Mr. Buchanan and Mr. Taney were men of the highest personal and official integrity and possessed the most delicate sense of the requirements and proprieties of the great stations which they occupied."

ties concerned in appealing it, and the manner in which the Judges arrived at the final disposition conclusively disprove Seward's statements. Nevertheless, similar charges were made by Hamlin, in a slashing speech in which he said that the slavery interests had secured control of the Legislative, the Executive and the Judiciary, and that the foreshadowing of the decision in the *Dred Scott Case* by Buchanan in his Inaugural Address was evidence of "political collusion and complicity" with the Court, whose "object was to rob the people and the States of the rights that belong to them." Wade also assailed the "late nefarious decision." "I wish I could entertain a good opinion of the Judges of that Court," he said. "I wish I could believe they were patriotic, unswerved by political considerations, or uninfluenced by anything but their duty. . . . I fear that the Court, swayed by political reasons, forgot the rights of Dred Scott, and plunged into this political whirlpool in order to control its currents." Like so many of their Republican associates at this time, both Wade and Hamlin entirely discarded the doctrines of John Marshall, and embraced with ardor the views of Jefferson relating to the functions of the Court. "I deny the doctrine that Judges have any right to decide the law of the land for every department of this Government," protested Wade. "You would have the most concentrated, irresponsible despotism on God's earth, if you give such an interpretation to the decisions of that or any other Court." "This is a purely political question, in regard to which Thomas Jefferson so early and so ably warned us against judicial interference," said Hamlin. "They had no more authority to decide a political question for us than we had to decide a judicial question for them."

Nor were the Republican speeches entirely confined to invective. Many Senators openly proclaimed the intention of their party to strive for a complete reformation or reorganization of the Court. Though the early accomplishment of this event did not seem, in 1858, very probable, since it would require the control of Congress and the Presidency by the Republican Party, nevertheless, Seward proclaimed with great earnestness: "Whether the Court recedes or not, we shall reorganize the Court, and thus reform its political sentiments and practices, and bring them into harmony with the Constitution and the laws of nature. In doing so, we shall not only reassume our own just authority, but we shall restore that high tribunal itself to the position it ought to maintain, since so many invaluable rights of citizens, and even of States themselves, depend upon its impartiality and its wisdom." And Zachariah Chandler of Michigan, stating that the present organization of the Court was "monstrous", since three fourths of the business was in the North with four Judges, and one quarter in the South with five Judges, said that the Republican Party meant "to annul the Dred Scott decision, the stump speech of Taney, the mere fanfaronade which is not a decision at all", by an entire reorganization of the Court. To these Republican extravagances of utterance, James F. Simmons of Rhode Island made a sane reply, saying: "I do not think there needs to be any reconstruction of the Court. . . . These decisions are not like the laws of the Medes and Persians. The decision of this Court in the *Dartmouth College Case* was thought to settle a principle, which induced our banks to refuse to pay the tax imposed upon them by the State, and the prevailing opinion at the Bar in Rhode Island was that the banks would be sustained by the Court. The

State brought the question here, and the Court decided in favor of the power of the State to tax corporations. . . . No such decision of this Court will stand, unless it has sound reason and sound law to rest upon. This question was decided when the public mind was in a feverish state, and the Court may have unwittingly been affected by the excitement. . . . We must wait until it subsides, and trust that then the errors it has occasioned will be corrected." [1]

On the Democratic side, lengthy and heated arguments were delivered in defense of the Court by Jefferson Davis of Mississippi, Stephen A. Douglas of Illinois, James A. Stewart of Maryland, Joseph Lane of Oregon and Judah P. Benjamin of Louisiana: and the latter made a full, eloquent and powerful answer to Seward's charges of corrupt bargaining between the President and the Court. George E. Pugh of Ohio, while not agreeing with the decision, stated that whenever the Court has decided the question as to the limits of territorial authority over slavery, "whatever may be my opinion as an individual, both as a Senator and a citizen, the judgment of the Court must be carried into effect. We cannot live an hour under any other doctrine. It is more important to the community, more important to the cause of good government, that a judgment, once pronounced by the appropriate tribunal, should go into effect, than that it should be decided rightly — far more." [2]

No discussion of the *Dred Scott Case*, either in Congress or elsewhere, had so potent an influence with the people as that which took place during the famous

[1] Speeches of Seward, March 3, 1858; Chandler, Feb. 17, 1859; Simmons, March 20, 1858.

[2] See especially speeches in 1858, of Davis, Feb. 8, Douglas, Feb. 8, 21, Stewart, March 24, Benjamin, March 11; in 1859, of Douglas, Feb. 23, Pugh, Dec. 19, in 1860, of Douglas, Jan. 12, Pugh, Jan. 12, Lane, Feb. 15; see also speeches in the House of Cox, Dec. 8, 1859, Noell, Dec. 12, 1859, Jan. 20, 1860.

series of joint debates between Abraham Lincoln and Stephen A. Douglas, in their Senatorial campaign in Illinois in the summer of 1858. Two years before, Lincoln had publicly expressed himself as willing to leave to the Supreme Court, the constitutionality of the Acts of Congress dealing with slavery in the Territories, and to submit to its decision.[1] In 1858, however, he stated that he declined to abide by the decision when rendered; and his views had a powerful effect upon the country. It is important, nevertheless, to note that Lincoln's position has, in later days, been greatly misrepresented by opponents of the Court, who cite him as authority for denying the Court's right to pass upon an Act of Congress. Such a doctrine was never asserted by him, and his attitude was summed up at Springfield, June 26, as follows: "Judicial decisions have two uses: first, to absolutely determine the case decided, and secondly, to indicate to the public how other similar cases will be decided when they arise. For the latter use, they are called 'precedents' and 'authorities.' We believe as much as Judge Douglas (perhaps more) in obedience to, and respect for, the judicial department of government. We think its decisions on constitutional questions, when fully settled, should control not only the particular cases decided, but the general policy of the country, subject to be disturbed only by Amendments of the Constitution, as provided in that instrument itself. More than this would be revolution. But we think

[1] See Lincoln's speech at Galena, Ill., Aug. 1, 1856, when he said: "I grant you that an unconstitutional act is not law; but I do not ask and will not take your construction of the Constitution. The Supreme Court of the United States is the tribunal to decide such a question, and we will submit to its decisions; and if you do also, there will be an end of the matter. Will you? If not, who are the disunionists, — you, or we?" *Works of Abraham Lincoln* (Federal Ed., 1905), II; see *ibid.*, III, Lincoln's speeches at Springfield, Ill., June 17, 1858, and at Chicago, July 10, 1858.

the Dred Scott decision is erroneous. We know the Court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this. We offer no resistance to it." This was precisely the language which would be appropriately used by a lawyer and a statesman who held the Courts and orderly legal procedure in due respect; but it in no way justified any attempt to disregard or disobey the decision of the Court. And again in his Inaugural Address in 1861, Lincoln pointed out that while a Court decision on a constitutional question did not control the political policy which the country would pursue, nevertheless, it must be held binding upon parties in any suit involving such questions. "I do not forget the position, assumed by some, that constitutional questions are to be decided by the Supreme Court," he said, "nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the Government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal. Nor

is there in this view any assault upon the Court or the Judges. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes."

While the Republican press and Republican leaders in Congress were thus continuing to arouse the sentiment of the country against the Court, the Supreme Court of Wisconsin had put itself in a position of open rebellion towards it. As has been already described, after the conviction of Booth in the United States District Court the Wisconsin Supreme Court ordered his release on habeas corpus, on the ground that the Fugitive Slave Law under which he had been convicted was unconstitutional.[1] A writ of error had been issued by the United States Supreme Court on motion of Attorney-General Caleb Cushing, returnable in December, 1855; but though this writ was duly served on its Clerk, the State Supreme Court directed him to make no return and to enter no order concerning the same on his journals or records. The Clerk, however, had already given a certified copy of the record to the United States District Attorney in March, 1855, before receiving any direction from the State Court. Accordingly, Attorney-General Cushing moved in the United States Supreme Court in May, 1856, to be allowed to file this copy. Before granting the motion

[1] One reason for the readiness of the State Courts to issue writs of habeas corpus for prisoners convicted in the inferior Federal Courts was the absence of any right of appeal to the Supreme Court of the United States for any person so convicted. At that period, no Federal statute provided any appeal in a criminal case. Repeated attempts to enact such a law failed in Congress. In August, and again in December, 1855, Senator Pugh, of Ohio, introduced a bill for writs of error in all such cases prosecuted by indictment in the Federal Courts, but Congress took no action. In January, 1859, a bill having been reported by the Committee on the Judiciary, a motion by Senator Bayard of Delaware to take it up was defeated. *35th Cong., 2d Sess.*, Jan. 13, 1859. In February, 1860, Pugh again introduced the bill. *36th Cong., 1st Sess.*, Feb. 18, 1860.

the Court decided to issue a special order to the State Court Clerk to make return, but the latter still refusing to comply, and there being thus a complete deadlock, the Court, on March 6, 1857 (the very day of its opinion in the *Dred Scott Case*), allowed the motion of the Attorney-General to file copy of the record, "to have the same effect and legal operation, as if filed by the Clerk with the writ of error." The case was not reached for final argument, until January 19, 1859. Meanwhile, however, a renewed effort was made in the abolitionist press and in Congress to weaken the authority of the Court, by a move to repeal the Twenty-Fifth Section of the Judiciary Act and to abolish the Court's jurisdiction on writs of error to State Courts; and bills for this purpose (originating in Ohio) were introduced in both the Senate and the House, in the spring of 1858.[1] While these measures failed of enactment by Congress, their introduction now by Northern statesmen marked a radical reversal in attitude towards the Court; for when similar repeals had been advocated in the past, in 1825–1826 and 1830–1833, their supporters were found almost entirely in the ranks of the Southern Democrats. "Twenty years ago, South Carolina denied the paramount authority of the Supreme Court of the United States and flew to arms to resist it," said the *New York Times*, "while Mas-

[1] *35th Cong., 1st Sess.;* see bill introduced by Senator George E. Pugh of Ohio, April 30, 1858, reported adversely by the Committee of the Judiciary, May 24, Dec. 16, 1858; Philemon Bliss of Ohio introduced a similar bill in the House. The only other Congressional attacks upon the constitution of the Court, which had taken place, in the twenty-seven years since the serious attack in 1831, were as follows: Senator Benjamin Tappan of Ohio had three times (1840, 1842, 1844) introduced a bill proposing a Constitutional Amendment to limit the term of office of Judges of the Supreme Court and of inferior Federal Courts; and in 1843, though defeated by a vote of eleven to twenty-four, such prominent Senators as James Buchanan, Thomas H. Benton and Levi Woodbury had voted for it; a similar bill had been introduced, in 1847, by Senator Sidney Breese of Illinois; see *26th Cong., 2d Sess.*, July 8, 9, Dec. 15, 1840; *27th Cong., 3d Sess.*, Dec. 12, 1842, Jan. 16, 1843; *28th Cong., 1st Sess.*, Feb. 20, 1844; *29th Cong., 2d Sess.*, Feb. 17, 1847.

sachusetts took the lead in asserting the absolute, unqualified duty of every citizen and every State to yield implicit obedience to its decisions upon all questions of constitutional law. Today, the position of these two States and of the sections which they represent is likely to be reversed, . . . and this change of position illustrates the fact, to which it is due, that interest and not reason rules over and regulates the action of States, as well as of individuals." [1] History had made plain that the North and South were equally willing to resort to an attack upon the jurisdiction of the Court, and that theories or principles of State-Rights or National Supremacy were adopted, or discarded, by the one or the other, according to the particular interests which were likely to be involved in the instant case. The change was well illustrated by a savage editorial in the *New York Tribune* at this time, in 1858, which said that it repudiated utterly "the abominable notion that a handful of political subalterns of the Federal Executive, his creatures and tools, appointed on partisan grounds and for political reasons, are to be permitted to sit in judgment on the political rights of great States, where those rights come in conflict with the exercise of that same Federal authority. If the Supreme Court behaves well enough to warrant a general confidence in it as a safe depository of private rights, so be it. But a safe depository of the political rights of the States, it never can be. . . . We rejoice in the hope that the doctrine of State Rights is at last to be reared above the mists of Virginia abstractionism and planted upon clear, solid ground. The theories of ancient Federalism in regard to the rights and powers of the States, though the offspring of wise heads and honest hearts, must give

[1] *New York Times*, March 9, 1857; *New York Tribune*, Feb. 18, 1858.

way before the advancing footsteps of a radical and clear-sighted democratic sentiment." And the bitterness of feeling towards the Court was expressed in the speech of Philemon Bliss, an ardent abolitionist Republican Congressman from Ohio:[1]

> The spectacle of a gowned conclave, gravely setting aside statutes and Constitutions of States; enforcing powers not granted in the compact, and against the express reservations of the States; with eager zeal reversing the whole current of authority and law, to make universal a local and exceptional despotism; prompting its ministers to mayhem and murder, sure of their illegal shield, never darkened our fathers' vision. Had a tithe of what we stupidly suffer been anticipated by them, the Federation would have been an impossibility; at least the Court would have been but a Hamilton's dream of a life Executive and Senate. . . . There never was a more serious mistake. . . . In reading over the 25th Section of the Judiciary Act of 1789, I have often wondered at the tameness of the States, thus at once made vassals. . . . When from yon mysterious vault, the enrobed nine send forth their tomes, befogging by their diffuseness, even when announcing the plainest principles . . . when essaying some new constitutional construction, as they call their attacks upon the rights of the States and their citizens, we are taught to bow without question, as the faithful to the decrees of the Grand Lama.

And Bliss further said, in advocating, not only the repeal of the Twenty-Fifth Section of the Judiciary Act, but also the repeal of Section seven of the Act of March 2, 1833, a bill which had been passed at the instance of President Jackson to aid in the suppression of the Nullification movement in South Carolina and which authorized Federal Courts to grant writs of habeas corpus where a prisoner was confined for acts

[1] *35th Cong., 2d Sess., App.*, 72, Feb. 7, 1859. Bliss later became a Federal Judge, himself; he was appointed Chief Justice of Dakota by President Lincoln in 1861, and served on the Supreme Court of Missouri from 1868 to 1873; he became Dean of the Law Department of the State University of Missouri in 1873.

done or omitted in pursuance of the laws of the United States: "It is a clear usurpation of Federal authority. The States have a right to execute their criminal laws. . . . The people are becoming roused to the true nature and alarming encroachments of the Federation. They look upon the Judiciary as the right arm of these encroachments. They will never yield their liberty; and if these things continue without remedy, the Federal Courts must fall. I would save them by timely remedy." When there was thus presented in Congress the curious spectacle of a Northern Republican advocating the repeal of a measure enacted for the destruction of Nullification and the preservation of the Union, it is no wonder that conservative leading newspapers of the North should have earnestly deprecated speeches of such a nature and should have termed the attempt to impair the Federal Judiciary — "the great bulwark of our safety" — as a "revolutionary step towards subverting the great principles of our Government."[1]

It was in this atmosphere of distrust and antagonism throughout the North, that on January 19, 1859, the Court listened to the argument of the *Booth Cases* by the Attorney-General of the United States, Jeremiah S. Black, no counsel appearing for the State of Wisconsin.[2] On March 7, almost exactly two years from the date of the Dred Scott decision, the judgment of the Court was pronounced by Chief Justice Taney in the most powerful of all his notable opinions. Undeterred by the opposition to its jurisdiction, or by the effect which its decision might have upon the slavery

[1] *National Intelligencer*, Dec. 10, 1858, quoting the *New York Journal of Commerce*.

[2] *Ableman* v. *Booth*, *United States* v. *Booth*, 21 How. 506. The case of *Ableman* v. *Booth* on which the Wisconsin Supreme Court had made a return to the writ of error had been docketed in the Supreme Court of the United States in due form in 1855, but had been postponed for argument to await the filing of the other case, *In re Booth*, on which the State Court had refused to make return to the writ of error.

issue, the Court remained adamant in upholding the National Government against all efforts at interference with its lawful functions. The rights asserted by the State Court to annul the proceedings of the United States Commissioner, said Taney, and to annul the judgment of a United States District Court, and also to determine that their decision is final and conclusive upon the United States Courts so as to authorize a Clerk to disregard and refuse obedience to a writ of error issued pursuant to the Federal Judiciary Act, were "new in the jurisprudence of the United States as well as of the States, and the supremacy of the State Courts over the Courts of the United States, in cases arising under the Constitution and laws of the United States, is now for the first time asserted and acted upon in the Supreme Court of a State." The Chief Justice then continued with a most vigorous exposition of the supremacy of the Federal jurisdiction in cases contemplated by the Judiciary Act and by the Constitution. The judgment of the State Court, he said, "would subvert the very foundations of this Government. . . . No one will suppose that a Government which has now lasted nearly seventy years, enforcing its laws by its own tribunals, and preserving the Union of the States, could have lasted a single year, or fulfilled the high trusts committed to it, if offenses against its laws could not have been punished without the consent of the State in which the culprit was found." Unless the National Government was supreme in its own sphere, it was evident that it would be "inadequate to the main objects for which the Government was established; and that local interests, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one State upon the rights of another, which

would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution peacefully by its judicial tribunals." Supremacy must be associated with "permanent judicial authority"; and serious controversies might arise between the authorities of the United States and of the States "which must be settled by force of arms, unless some tribunal was created to decide between them, finally and without appeal. The Constitution accordingly provided, as far as human foresight could provide, against this danger," by conferring upon the Federal Courts the supreme power and jurisdiction. "So long, therefore, as this Constitution shall endure," said Taney, "this tribunal must exist with it, deciding in the peaceful forms of judicial proceedings the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force." And he added: "Nor can it be inconsistent with the dignity of a sovereign State, to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a State of this Union. On the contrary, the highest honor of sovereignty is untarnished faith." With these ringing words in defense of the National supremacy, the Chief Justice concluded the opinion of the Court and announced the reversal of the judgments of the State Courts — an opinion which Marshall himself never excelled in loftiness of tone.

"He has lived long and done much for honor and fame. But here is the summit. He will never surpass the wisdom and value of his recent opinion," was the comment of a Washington newspaper.[1] "It

[1] *The States*, March 11, 1859.

must put an end, for the future, to all contests between the United States and States as to the constitutionality of the Fugitive Slave Law; and all attempts hereafter by State Courts to interfere with officers of the United States in carrying it out will be regarded as revolutionary, and treated as such," said a Democratic paper in New York. "We trust that it will be read with careful, and in the case of men willing to violate the law, with prayerful attention, for the sound law and truthful doctrines it teaches," said an Ohio Democratic paper, which also stated that the Court had well termed Wisconsin's action as "totally illegal and virtually revolutionary." [1] A leading Republican paper in Philadelphia said that: "The conduct of the Wisconsin Court was such as to preclude any other decree. They refused to allow the record to be sent up, thus setting at defiance the established usage, and exhibiting a purpose to disregard the authority of the tribunal of last resort. This is one of the legitimate consequences of the extreme theory of popular sovereignty which will go on augmenting its demands, until judicial decrees, like party platforms, must be subjected to the revision of caucuses, conventions and mobs. Then the reaction will begin and we shall run to the other extreme."

On the other hand, the more extreme Republican press denounced the decision as destined to be quite as notorious as the *Dred Scott Case*, and as "forming a part of the same system of usurpation, tending to the concentration of all power in the Federal Judiciary"; [2] and the *New York Evening Post*, after commending and indorsing the alleged views of Thomas Jefferson and

[1] See *New York Herald*, March 8, 1859; *National Intelligencer*, March 20, 1859; *Cleveland National Democrat*, May 2, March 17, April 25, 1859; *Philadelphia North American*, March 10, 1859.

[2] *New York Tribune*, March 6, April 1, 1859; *New York Evening Post*, March 21, 1859.

of John C. Calhoun, as to the danger of encroachment by the Federal Courts on the States, said that: "Nothing more fatal to the reserved rights of the States, nothing more dangerous to the securities of the individual, can well be conceived, than the authority claimed for it in the recent decision of Judge Taney. . . . The process of the Supreme Court is supreme and final; and no State law or decision of a State Court which interferes with the execution of the Fugitive Slave Act has any constitutional force. Now, so far as this decision is intended to give strength to the Fugitive Slave Act, it is not of much importance; for that Act is very much of a dead letter upon the statute book, the moral sense of the community refusing to execute it in the greater number of cases; but, so far as it asserts a principle, it is an alarming assumption of power. It places the liberty of the citizen, it seems to us, wholly at the disposal of the Federal tribunals, and supersedes every protection which he might claim from the Courts of his own State. . . . No matter whether the Legislature of his State, or the Courts of his State, shall have pronounced the law under which he is arrested, constitutional or not, he is shorn of all guaranties of security, and must bow in silence to the mandate of the Federal officer. The Fugitive Slave Act itself was an enormous stretch of Federal power, and an abrogation, so far as it was itself concerned, of the right of trial by jury; and now we see it compelling another overturn of ancient landmarks, in the virtual denial of one of the oldest and most sacred muniments of jurisprudence." Other Republican papers similarly raised the standard of revolt, and expressed the hope that Wisconsin would not yield obedience to the Court's mandate.

The Wisconsin Legislature almost at once adopted

defiant resolutions declaring the "assumption of jurisdiction by the Federal Judiciary" to be "an act of undelegated power, and therefore without authority void and of no force," "an arbitrary act of power, unauthorized by the Constitution, and virtually superseding the benefit of the writ of habeas corpus and prostrating the rights and liberties of the people at the foot of unlimited power" and further declaring that the principle contended for, that "the General Government is the exclusive judge of the extent of the powers delegated to it, stops nothing short of despotism", and that the several States which formed the Constitution, "being sovereign and independent have the unquestionable right to judge of its infraction; and that a positive defiance of those sovereignties, of all unauthorized acts done or attempted to be done under color of that instrument, is the rightful remedy." [1] The views thus announced were simply a reiteration of the notorious Virginia and Kentucky Resolutions of 1798–1799 and of South Carolina's Nullification doctrine of 1833; and they were so treated in a stirring editorial criticism appearing in the *National Intelligencer:* "So far as this declaration of the Wisconsin Legislature affirms that the mandate of the Supreme Court . . . is 'void and of no force', it was doubtless meant to be nothing more than *brutum fulmen*, as we do not permit ourselves to suppose that the Legislature seriously purpose to raise any practical issue which shall have for its effect to try conclusions with the judicial power of the Federal Government, as exercised through the only tribunal known to the Constitution. . . . As to the second declaration, which under some confusion of diction, purports to deny the right of the Supreme Court to act as the final and ex-

[1] See especially *State Documents on Federal Relations* (1911), by Herman V. Ames.

clusive judge of the meaning and extent of the powers granted by the Constitution, we need not say that it is but a rehash of the Resolutions of '98 and '99, which, after having served their day in Virginia, are found reappearing in other quarters. . . . By dint of long and hard usage, they have come to be somewhat the worse for wear, and therefore furnish but an indifferent disguise by which to hide the deformity of Nullification." [1] The *New York Times* regarded the situation as serious in its possibilities, "since questions of jurisdiction between the Supreme Court and State tribunals are in their nature among the most dangerous which are likely to arise in the practical working of our Government." While it apprehended no actual forcible conflict in Wisconsin, yet, it said, "similar disputes have heretofore been the most disturbing forces our political machinery has been subject to, and what has already occurred may happen again. The remedy must be looked for in mutual forbearance on the part of the General Government from the exercise of odious and doubtful powers, and on that of the several States, by acquiescence, where no serious injury can result." In spite of conservative advice of this nature which prevailed generally outside of abolitionist circles, the Supreme Court of Wisconsin refused to comply with the mandate of the Supreme Court of the United States. On September 22, 1859 — six months after Taney's decision — a motion was made and argued by the United States District Attorney to file with the State Court Clerk the two mandates from the Supreme Court. This motion was not granted, since Chief Justice Luther S. Dixon and Judge Orsanus Cole differed in opinion, and the third Judge, Byron Paine,

[1] *National Intelligencer*, April 1, 1859, editorial "The Resolutions of '98 bearing Fresh Fruit"; *New York Times*, April 11, 1859.

declined to act, having previously been counsel for Booth and elected a Judge for that reason.[1] The Federal Courts were not so easily to be prevented from asserting and enforcing their authority. Booth was again arrested by the United States marshal in March, 1860, and again sued out a writ of habeas corpus in the State Supreme Court. "This case brings the question of State-Rights to an issue," wrote young Carl Schurz, who had been retained as counsel. "We shall now have the final decision of the great contest between the State of Wisconsin and the United States District Court. It is really dreadful that that rascal Booth is involved in this case, and that the great cause has to bear the burden of his sins. But the principles that must be maintained are of so lofty a nature that all other considerations vanish." [2] The State Court was unable to take any action, as Judge Paine felt himself disqualified to sit, and the other two Judges differed in their opinion. Only with the opening of the Civil War was the deadlock broken.[3] But as Schurz wrote later: "The Republican party went to the very verge of Nullification, while the Democratic party . . . became an ardent defender of the Federal power. . . . Thus in the North, as well as in the South, men's sym-

[1] *In re Booth*, 11 Wisc. 498 In *Von Baumbach* v. *Bade* (1859), 9 Wisc. 559, a case in no wise connected with the slavery issue, and involving a State mortgage law, which the Court unanimously held constitutional, Judge Paine in concurring again felt it necessary to set forth his view that the State Court was not bound by decisions of the United States Supreme Court.

[2] *Speeches, Correspondence and Political Papers of Carl Schurz* (ed. by Frederic Bancroft, 1913), II, letter of March 2, 1860.

[3] The final decision in this Booth episode was rendered after the opening of the War, when in June, 1861, the Wisconsin Supreme Court held that the United States District Court had legal jurisdiction of a suit brought against Booth, by the Missouri owner of the slave rescued by Booth, to recover a penalty for such rescue, as authorized by the Fugitive Slave Law, and that a judgment for $1246 levied on Booth's printing press by the United States marshal, Feb. 24, 1857, was a valid judgment, which would not be collaterally attacked in the State Court, on the ground that the Fugitive Slave Law was unconstitutional. *Arnold* v. *Booth* (1861), 14 Wisc. 180.

pathies with regard to slavery shaped and changed their political doctrines and their constitutional theories. In the South, it was State-Rights or the supremacy of the Federal power, as the one or the other furthered the interests of slavery; in the North, it was State-Rights or the supremacy of the Federal power, as one or the other furthered the interests of freedom." [1]

Meanwhile, a similar disregard of the Court's decision was shown in the State of Ohio, where for many years conflicts of jurisdiction between the State and Federal Courts had taken place in the case of fugitive slaves. In the spring of 1859, just after the decision of the *Booth Case*, trials were held in the Federal District Court for the Northern District of Ohio, of the famous *Oberlin Rescue Cases* — indictments for violation of the Fugitive Slave Law. After conviction and sentence of the defendants, the Supreme Court of Ohio, in deliberate defiance of the decision in the *Booth Case*, issued writs of habeas corpus for the defendants then in custody of the United States marshal, and the State Court proceeded to assume the power to decide for itself the constitutionality of the Federal Law involved. Fortunately, its decision was rendered in favor of sustaining the validity of the Law; and thus a direct conflict between the Federal and State authorities was avoided.[2] The opinion, coura-

[1] *Reminiscences of Carl Schurz* (1907), II, 105–115. Schurz wrote that when he published his speeches in 1865, he omitted his speeches in the Wisconsin campaign in 1859, "because a more mature judgment had convinced me that, not indeed the fundamental theory of democracy, but the conclusions drawn from it as to the functions and necessary power of Government, were unsound."

[2] As to these *Oberlin Rescue Cases* — *United States* v. *Simeon Bushnell, United States* v. *Langston* and *Ex parte Bushnell*, 9 Ohio State, 77–325 — see *History of Ohio* (1912), by Emilius O. Randall and Daniel J. Ryan, IV, and see interesting accounts and editorials in *Cleveland National Democrat*, March 17, April 8, 13, 15, 16, 25, 26, 28, 29, 30, May 11, 19, 31, June 6, 10, 1859; *Ohio Statesman*, April 19, 23, 24, 27, 28, 29, May 3, 4, 28, 29, 31, 1859. It may be noted that because of his decision in this case, the very able Chief Justice, Swan, was refused renomination to

geously given by a Republican Chief Justice, resulted, however, in his defeat for renomination, a few weeks later, at the instance of Chase, Wade and Giddings, the abolitionist leaders. The seriousness of the situation was reflected by the statement, commonly made at the time, that had the Court decided otherwise, Governor Chase stood ready to use the State troops in defense of its jurisdiction against the Federal authorities; and, as a Democratic paper said: "A conflict would have been the consequence, and thus would civil war have for a time existed; for they may rest assured that, under no circumstances, would they have been permitted to carry out their mad, treasonable design of nullifying the laws of the United States, and substituting anarchy and misrule in the place of law and the Constitution." A Republican paper stated, however, that the law would be obeyed, but only until such time as the Federal Supreme Court should be reformed.[1]

In Congress, the decision of the *Booth Case* brought forth denunciations of the Court, nearly as strong as those which, in 1858, followed the *Dred Scott Case;* and many speeches were made in defense of the legislation of the various States, known as the Personal Liberty Laws, enacted for the purpose of nullifying the enforcement of the Fugitive Slave Law.[2] In a debate on the subject, Senator Hale stated that for thirty years the Court had consisted only of politicians, that

the Bench by the Republican Party at its next spring convention — an interesting example of the evils of a judicial recall system.

[1] *Cleveland National Democrat,* May 31, 1859, and also quoting *Dayton Republican Gazette.* In *ibid.,* May 28, 1859, it was said editorially: "The *Ohio State Journal* thinks that we regard the State of Ohio 'not as a sovereign State but as a mere Province of the Federal Government.' . . . But as a member of the Federal Union, the State of Ohio is bound to respect that law. . . . It does not become the Executive of the State to encourage resistance, nor the Court to meditate its nullification."

[2] The so-called Personal Liberty Laws had been passed in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, Michigan, Wisconsin, Iowa and Ohio.

it was now a dangerous department of the Government, that "its history has verified all, and more than all, that Jefferson ever prophesied of it", that its opinion upon political questions should have no weight. "If its encroachments will not be met by Congress they must be met, as Jefferson said, by the action of the State Governments."[1] After praising the past action of Virginia and Georgia in disobeying the mandates of the Court, and after indorsing the alleged views of Jefferson, Jackson and Buchanan as to freedom of Congress from control by the Court's decisions, Hale derided the "new doctrine of the infallibility of the Court now entertained by the Democratic party", which, he said, "after fighting a life-long battle against the Court, had now become great sticklers for the dignity and binding authority of the Court." Senator Doolittle of Wisconsin also indorsed the rebellious actions of Pennsylvania, Virginia and Georgia in the past, and rejoiced that the Supreme Court of Wisconsin had followed their example. While acknowledging the "distinguished ability, industry almost unequalled, honesty of purpose and pure and upright personal character" of Taney, he stated that the tendency of the Chief Justice and of his Court was to absolutism, by the consolidation of all power in that branch of the Government, and that the questions, whether that Court was to be the sole ultimate judge as to the powers delegated by the Constitution to the Federal Government or reserved to the States, and whether upon all constitutional questions the Supreme Courts of the States are inferior and subordinate to the Federal Courts, had always been the battleground of the political contests in this coun-

[1] *36th Cong., 1st Sess.* and *App.;* speeches in 1860 of Hale, Feb. 14, Doolittle, Feb. 24, Collamer, March 8, Grimes, Feb. 24, Wade, March 7, Conkling, April 16, 17; see also speeches of Bingham, April 24, in the Senate and of T. B. Florence of April 12, in the House.

try. He admitted that the Republicans hitherto had espoused, and the Democrats opposed, the "Federal doctrine of judicial supremacy"; but now, he asked: "For what purpose have the Democrats set up this judicial Vatican? Why should the leaders of this party interpolate into its creed, this new dogma of the supreme, infallible, and irrevocable doctrine of the Supreme Court?" And he uttered the prediction, that if the power of the Court to decide on the validity of laws for all other departments should be continued, "the days of the empire will commence soon after." Senator Collamer of Vermont said he would not bow down to the Court "as to the inscrutable dispensation of Divine Providence." In the House, Roscoe Conkling, a Republican Congressman from New York (who only twelve years later was offered appointment as Chief Justice), delivered a violent assault on the Court and its "imperial assumptions", stating that "wherever a decision, in the judgment of Congress, is subversive of the rights and liberties of the people, or is otherwise hurtfully erroneous, it is not only the right, but the solemn duty, of Congress to disregard it";[1] and he also cited Jefferson and Jackson as his

[1] Conkling's speech was directed at the statement by President Buchanan in his Third Annual Message to Congress, Dec. 19, 1859, as follows:

"I cordially congratulate you upon the final settlement by the Supreme Court of the United States of the question of slavery in the Territories which had presented an aspect so truly formidable at the commencement of my administration. The right has been established of every citizen to take his property of any kind including slaves into the common Territory belonging equally to all the States of the Confederacy and to have it protected there under the Federal Constitution. Neither Congress nor a Territorial legislature nor any human power has any authority to annul or impair this vested right. The Supreme Judicial tribunal of the country which is a coördinate branch of the Government has sanctioned and affirmed these principles of constitutional law so manifestly just in themselves and so well calculated to promote peace and harmony among the States."

Buchanan, as late as his Fourth Annual Message, Dec. 3, 1860, continued to maintain the correctness and supremacy as law of the Dred Scott decision, saying that "such has been the factious temper of the times", that it has been "extensively impugned before the people and the question has given rise to angry political conflicts throughout the country."

authorities. He advocated "a reorganization and reinvigoration of the Court, with just regard to commercial and political considerations. . . . It is high time that appropriate weight shall be given in the Court and elsewhere to all portions of the country, not excepting those in which a vast preponderance of its wealth, its business and its numbers reside."

Speeches of this nature were commended by radical anti-slavery papers like the *Independent*, which spoke of the "encroachments" of the Judiciary "at the will and instigation of the Slave Oligarchy. . . . The Supreme Court, in the defense of slavery, has become the great teacher of injustice and iniquity, the sapper and miner of our liberties, the great agent of the powers of darkness in debauching the conscience of the country and thus preparing the people to become the victims of the slave despotism." [1]

On the other hand, eloquent defenses of the Court were made in Congress. "We have hitherto debated," said Senator Robert Toombs, of Georgia, "the supremacy of the Federal Courts over the State Courts; but Wisconsin has asserted the supremacy of the State Courts over the Federal Courts. Nobody ever claimed, until Wisconsin, that a State Court, high or low, could seize a case in the Federal Courts and review it. . . . Wisconsin has outstripped all of her delinquent sisters in their disgraceful race of infidelity to the compact." John W. Noell of Missouri, in the House, made a particularly able speech, denouncing those Republicans who, like Conkling, "had raised on the floor of Congress the standard of rebellion to the

[1] *Independent*, March 1, 8, 1860; *36th Cong., 1st Sess.*, and *App.*, speeches of Toombs, Jan. 24, Feb. 27, March 7, 1860, speeches of Noell, April 25, Reagan of Texas, Jan. 4, Larrabee of Wisconsin, Jan. 4, 1860.

decrees of the Court. Though that Department still preserves its ancient purity and firmness, it has not kept pace with their progressive fanaticism. Its authority to decide questions of constitutional law is now gravely disputed. . . . These modern Solons have discovered a great distinction between questions which they call political and those which are not political. Every question, while it is pending here is a political question, and every question, when it is transferred to the Judiciary is a judicial question. No law passed by Congress affecting the rights of persons or the rights of property but must be decided upon and enforced by the Judiciary. . . . No man contends that a judgment or opinion of the Federal Judiciary can tie the hands of Congress; but every man who has read the hornbooks of the profession ought to know that, when we enact a law, its validity and constitutionality must be determined by the Judiciary. That determination in this particular instance can only be avoided by rebellion or revolution."

These years of turmoil in politics and of conflict over the Court's decisions affecting the slavery issue, extending from 1854 to 1860, were productive of few other cases of supreme importance in American legal history; and they may be briefly summarized.

With the year 1855, there came to an end the long series of cases in which, for twenty-five years, the Court had been confirming vast numbers of imperfect grants made by Spanish officials in Florida, Louisiana and Missouri prior to the cessions of those territories; and though many of these claims had been of an extremely suspicious character, the Court, in its scrupulous observance of the spirit of the treaties with France and Spain, had preferred to err on the side of justice to the claimant, rather than to give the benefit of the doubt

to the Government.[1] But with the disappearance of these cases from its docket, there arose the first of another series which lasted for a further quarter of a century; and in *Cervantes* v. *United States*, 16 How. 619, and *Fremont* v. *United States*, 17 How. 442, general doctrines of law were outlined, on which the Court was to decide the many great Mexican land claims arising in California, Texas and the Southwest territories. In these cases, the Court again showed its anxiety to protect, to the utmost, rights originating under grants from the foreign government with which the United States had concluded a treaty.[2]

On February 19, 1856, in *Murray* v. *Hoboken Land and Improvement Co.*, 18 How. 272, the Court, for the first time since 1819, interpreted the meaning of "due process of law" as contained in the Fifth Amendment.[3] The case, argued with great ability by Benjamin F.

[1] A few claims for very large tracts, where no sufficient identification had taken place before cession, were rejected; see *United States* v. *Kingsley*, 12 Pet. 476, five miles square; *United States* v. *Delespine*, 15 Pet. 319, 92, 160 acres; *United States* v. *Miranda*, 16 Pet. 153, 368,640 acres; *United States* v. *Boisdoré*, 11 How. 63, a tract of 15 by 40 miles; *Doe* v. *Braden*, 16 How. 635, 12,000,000 acres.

[2] The case of the claim of John C. Fremont "of unusual public interest" was argued Feb. 20, 21, 22, 1855, and was described by the *National Intelligencer*, Feb. 26, as follows: "The venerable and learned Mr. Chancellor (George M.) Bibb followed Mr. Jones on the same side in a clear, comprehensive and argumentative address, crowding the merits of the case into the brief space of half an hour. Attorney-General Cushing followed on behalf of the United States, and charmed a large and brilliant audience, during two hours on Wednesday morning, by a discourse of unusual interest and strength, a good portion of it historical, and having the attractiveness of romance, and all of it such as to engross the attention of the Court, the Bar and all hearers. The Attorney-General was replied to, and the argument of the cause concluded, by Hon. John J. Crittenden. Mr. Crittenden brought into the argument, not only legal acumen and research, but all the impassioned eloquence that has distinguished his most powerful efforts, whether in the Senate or before judicial forums, and was listened to with marked attention by a crowded audience of the beauty and intellect at present congregated in the city. . . . We presume from all we have heard that the eloquent Kentuckian equalled, if he did not surpass, any previous effort, forensic or Senatorial; he certainly never produced a higher admiration of his powers, or ever received more emphatic applause, from the grave members of the Bench, we believe, as well as the Bar and crowded auditory." See also *ibid.*, March 11, 1855; *Philadelphia North American*, Feb. 21, 1855.

[3] See Johnson, J., in *Bank of Columbia* v. *Okely* (1819), 4 Wheat. 235.

Butler, George Wood and Edgar S. Van Winkle against Ransom H. Gillet, Joseph P. Bradley and A. O. Zabriskie, involved the rights of a purchaser of land sold under a distress warrant issued by the Solicitor of the Treasury against lands of Samuel Swartwout — a former notorious collector of customs at New York, who had defaulted in the sum of $1,479,000. The Court held that such a summary method for the recovery of debts due to the Government from defaulting receivers of the revenue constituted due process, even though no Court trial was provided, inasmuch as such methods were known to the old English law.

At the December Term of 1857, in *Jackson* v. *Steamboat Magnolia*, 20 How. 296, the Court completed the reversal of the former narrow doctrines as to the extent of admiralty jurisdiction entertained by Marshall. The question involved was whether the Federal Court had jurisdiction over a libel for a collision on the Alabama River above tidal flow and wholly within the State of Alabama. The case was twice argued; and the decision upheld the Federal admiralty powers in the most sweeping manner. It is a "remarkable" and "startling assumption of power", said Judge Daniel, again dissenting and fearful of the Court's "indefinite and indefinable pretensions" and the "ceaseless march of central encroachments." In spite of such fears on the part of its dissenting Judge, the Court showed itself zealous to defend the State sovereignty in *Taylor* v. *Carryl*, 20 How. 583, by holding that a vessel attached in a State Court could not be sold by a United States marshal on an order from the United States District Court in a libel for seamen's wages. The case, said Judge Campbell, had been regarded in this Court as one of importance, but it did not present a new question and "is not determinable upon any novel prin-

ciple. . . . It forms a recognized portion of the duty of this Court to give preference to such principles and methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may coöperate as harmonious members of a judicial system coextensive with the United States, and submitting to the paramount authority of the same Constitution, laws and federal obligation. The decisions of this Court that disclose such an aim, and that embody the principles and modes of administration to accomplish it, have gone from the Court with authority, and have returned to it, bringing the vigor and strength that are always imparted to magistrates, of whatever class, by the approbation and confidence of those submitted to their government." [1] It is interesting to note that this strong defense of the State tribunals was uttered on May 18, 1858, and less than a year before the Court's equally strong defense of National supremacy in the *Booth Case*.

At the December Term of 1858, important questions of business law came before the Court. In *Covington Drawbridge Co.* v. *Shepherd*, 21 How. 112, argued by Oliver H. Smith against Richard W. Thompson, the question of the power of a Court in equity to appoint a receiver for a corporation to collect tolls and hold them for creditors, was presented for the first time; and though now so familiar a practice, it was then said to be a "question of great importance and some difficulty." The Court, however, sustained the power. The first of a tremendously long line of cases involving the validity of municipal bonds when held by a bona fide purchaser was decided in *Commissioners of Knox County* v. *Aspinwall*, 21 How. 539; and two years

[1] The case was twice argued at this Term, first on Dec. 14, 1857, and again on April 12, 13, 14, 1858, by William M. Evarts against John Cadwalader and Samuel Hood.

later in this case (24 How. 376), it was held that such bondholders might obtain a mandamus from the Circuit Court to compel an Indiana municipality to levy a tax to satisfy a judgment rendered in a suit on the bonds. This was the first case in a Federal Court in which a mandamus was issued against a State official.[1] Railroad bonds were also for the first time decided to be negotiable instruments, in *White* v. *Vermont and Massachusetts R. R. Co.*, 21 How. 575, Judge Nelson saying that "within the last few years, large masses of them have gone into general circulation and in which capitalists have invested their money"; and if the quality of negotiability were not conceded to them, the value of such securities "as a means of furnishing the funds for the accomplishment of many of the greatest and most useful enterprises of the day would be impaired."

The December Term of 1859 was a long one, the Court adjourning on May 4, 1860. The Chief Justice and Judge Daniel were both too ill to sit on the Bench, and considerable fear was expressed lest the former might never return. Talk was rife as to the possibility of the appointment by President Buchanan of either the Attorney-General, Jeremiah S. Black, or the former Attorney-General, Caleb Cushing, as Taney's successor;[2] and the weakened condition of the Court gave rise to renewed demand for a relief of the Judges from Circuit duty, so that they might devote more time to clearing the overloaded docket in the Supreme Court. "This reorganization is not a

[1] See also *Aspinwall* v. *Daveiss Co.*, 22 How. 364; *Bissell* v. *Jeffersonville*, 24 How. 287; *Amey* v. *Allegheny City*, 24 How. 364; *Jurisdiction in Mandamus in United States Courts*, by Glendower Evans, *Amer. Law Rev.* (1885), XIX.

[2] *New York Tribune*, Feb. 14, April 27, 1860; *New York Evening Post*, Dec. 14, 1860, said that Taney's resignation was unlikely: "He, like Mr. Buchanan, takes a sort of melancholy satisfaction in being the last incumbent of the office he holds."

boon to the Judges, but a benefit to the public," required by the demand for justice for litigants.[1] At this Term, the suits involving California land claims continued to occupy a large proportion of the Court's time,[2] and few cases of historical importance were decided. Two may be noted, however. In *Sinnot* v. *Davenport*, 22 How. 227, an Alabama shipping law was held to be in conflict with legislation by Congress as to coasting trade, and therefore unconstitutional; and again the supremacy of the National Government was powerfully set forth by the Court. To the argument that the State statute was merely an exercise of the State police power, Judge Nelson answered that State legislation enacted in the exercise of an undisputed reserved power must yield to an Act of Congress passed in the exercise of a clear power under the Constitution. "There has been much controversy, and probably will continue to be, both by the Bench and the Bar, in fixing the true boundary line between the power of Congress under the commercial grant and the power reserved to the States. But in all these discussions, or nearly all of them, it has been admitted, that if the Act of Congress fell clearly within the power conferred upon that body by the Constitution, there was an end of the controversy. The law of Congress was supreme."

In *Alabama* v. *Georgia*, 23 How. 505, argued on December 14, 1859, and decided on May 1, 1860, the singular condition was presented of two States of the Union, on the very eve of their secession, submitting

[1] *Philadelphia North American*, March 14, 1859, Feb. 15, 1860.

[2] Among the most important cases won by the Government were *United States* v. *Bolton*, 23 How. 341, involving about 30,000 acres in San Francisco, argued April 2, 1860, by Attorney-General Black and William B. Reed of Philadelphia against J. Mason Campbell and Robert J. Walker; *Luco* v. *United States*, 23 How. 515, involving about 200,000 acres, argued by Caleb Cushing against Edwin M. Stanton. See *New York Tribune*, April 12, 1860.

controversies over their boundary line to the Supreme Court, for decision under the Constitution which they were about to repudiate.[1]

Within three days from the date of this decision, the *Dred Scott Case* developed its most potent consequence, when, on May 3, 1860, the Democratic Party then holding its National Convention at Charleston broke up in dissension, to reassemble six weeks later in two irreconcilable wings and to present two nominees for the Presidency — Stephen A. Douglas and John C. Breckinridge, representing hopelessly irreconcilable views. In thus splitting the Democratic Party, the Dred Scott decision had an even greater effect upon American history than in solidifying the anti-slavery sentiment at the North. When, in 1855, Douglas had succeeded, through the passage of his Kansas-Nebraska Bill, in establishing his doctrine of "squatter sovereignty", the party, united and enthusiastic, had regarded the legislation as a final and practical solution of the slavery question. The language of the statute that it was "the true intent and meaning of this Act not to legislate slavery into any Territory or State or to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic institutions, subject only to the Constitution of the United States", was believed to fix definitely the principle of non-intervention by Congress with slavery in the States and Territories, which had been adopted in the Compromise of 1850. There was, how-

[1] In 1853, an interesting point of practice had been decided; in an original suit between States to establish a boundary line, *Florida* v. *Georgia*, 17 How. 478, the Attorney-General of the United States was permitted to intervene on behalf of the Government and to adduce evidence, examine witnesses and be heard on argument; four Judges (Curtis, McLean, Campbell and Daniel) dissented, contending that to permit such intervention was to allow a suit against a State by the United States which the Constitution did not provide for. It is interesting to note that in this defense of the rights of the State, two Northern Judges joined with two Southern. See for history of this dispute, *Coffee* v. *Groover* (1887), 123 U. S. 1.

ever, an unforeseen ambiguity in this language which was destined to prove fatal to the Democratic Party. The intention of Senator Douglas was to give the people of the Territory the right to decide for themselves on the subject of slavery; but the question soon arose: Was this right given to the Territorial Legislature or only to the people of the Territory when framing its Constitution preparatory to admission as a State? It was answered when Chief Justice Taney, in his decision in 1857, announced flatly that as Congress had no power to exclude slavery, so it could not authorize a Territorial Government to exercise such a power. "It could confer no power on any local government, established by its authority, to violate the provisions of the Constitution." This was a body blow to Douglas' theory of popular sovereignty in the Territories; and thereafter, his attempts to maintain it were in vain. Republicans and Democrats alike quoted Taney's decision against him. The main body of Southern Democrats, after 1857, insisted that their party platform should embody the exact language of the *Dred Scott Case*, and should not admit the right of a Territory to deal in any way with the subject of slavery, except through its Constitution adopted for the purpose of becoming a State. Douglas, however, continued to fight for his pet doctrine, as the only fair solution of the question; and, in 1859, he wrote that he could not be the Democratic candidate for President if the party insisted on the principle "that the Constitution either established or forbade slavery in the Territories, beyond the power of the people to control it as other property." It was on this issue that the party divided in 1860 into two opposing factions.[1]

[1] See especially *A History of the American People* (1902), by Woodrow Wilson, IV; *The Lost Cause* (1867), by Edward A. Pollard; *Life and Times of William Lowndes Yancey* (1892), by John W. DuBose; *Political History of Secession* (1914),

Had it not been for such division, Lincoln's election might have been doubtful; for the popular vote for the combined opposing candidates in California and Oregon far exceeded, and in Ohio, Indiana and Illinois very nearly equaled, the vote cast for Lincoln; while of the popular vote over the whole country Lincoln received only 1,866,452 as against 2,223,110 cast for his Democratic opponents and 590,636 cast for John Bell, the candidate of the Constitutional Union party. It may fairly be said that Chief Justice Taney elected Abraham Lincoln to the Presidency.

by Daniel Wait Howe; *Our Presidents and How We Make Them* (1900), by A. K. McClure.

The Douglas Platform on slavery was as follows: "That the Democratic party will abide by the decisions of the Supreme Court of the United States on the questions of constitutional law. That . . . during the existence of the Territorial Governments, the measure of restriction, whatever it may be, imposed by the Federal Constitution on the power of the Territorial Legislature over the subject of the domestic relations, as the same has been, or shall hereafter be, determined by the Supreme Court of the United States, should be respected by all good citizens, and enforced with promptness and fidelity by every branch of the General Government."

The Breckinridge Platform was as follows: "That the Government of a Territory organized by an Act of Congress is provisional and temporary, and during its existence all citizens of the United States have an equal right to settle with their property in the Territory, without their rights, either of person or of property, being destroyed or impaired by Congressional legislation. That it is the duty of the Federal Government, in all its departments, to protect, when necessary, the rights of persons and property in the Territories, and wherever else its constitutional authority extends. That when the settlers in a Territory, having an adequate population, form a State Constitution, the right of sovereignty commences, and being consummated by admission into the Union, they stand on an equal footing with the people of other States; and the State thus organized ought to be admitted into the Federal Union, whether its Constitution prohibits or recognizes the institution of slavery."

CHAPTER TWENTY-EIGHT

CIVIL WAR AND CHIEF JUSTICE CHASE

1861–1866

BEFORE the beginning of the December, 1860, Term, Judge Peter V. Daniel died on May 30, 1860, after a service on the Bench of nineteen years. The South was insistent that the new appointee should come from that section of the country; for the Court (exclusive of the Chief Justice) was evenly divided — four from the North and four from the South. Among those urged for the position were William L. Yancey of Alabama, and Alexander H. Handy and Samuel S. Boyd of Mississippi;[1] but the strongest and ablest candidate suggested was William J. Robertson, Judge of the Court of Appeals of Virginia: "The appointment of a successor to Judge Daniel is of very little less importance to the South than the election of the next President," wrote one of Robertson's supporters; and another wrote: "The Court is the last line of defense which, it seems, is now left us."[2] On the other hand,

[1] *Franklin Pierce Papers MSS*, see letter of G. M. Davis, Aug. 8, 1860, and S. S. Boyd, Aug. 18, 1860; *Washington Star*, Dec. 17, 1860.

[2] *Correspondence of Robert M. T. Hunter*, in *Amer. Hist. Ass. Rep.* (1916), II. Franklin Minor wrote June 5, 1860: "There may be no danger of a wrong appointment, but still I am filled with solicitude by a rumor which I have heard, that James Lyons is the favorite of Mr. Buchanan. . . . Our friends all believe William J. Robertson of the Court of Appeals is the very man for the place. True as steel and firm as a rock, the South may rely on him with the surest confidence. He is, moreover, in the prime of life, and may live to serve us long, even until the stormy and the evil day may come as it surely will come, if we cannot break our bonds, which I fear we cannot yet. To incorruptible fidelity and unflinching firmness, Robertson adds vast stores of legal learning which will make him a great Judge." William M. Ambler wrote, June 11, 1860: "The vacancy on the Bench of the Supreme Court has caused almost every man of sound State-Rights principles to turn to my friend, William J. Robertson. . . . He is so pure morally and intellectually,

the Republicans, regarding the Court with suspicion, were equally insistent that no further representatives of slavery interests should be appointed; and Charles Sumner wrote at this time (referring to rumors as to Taney's proposed resignation): "I know no man at this time who is fit for the office of Chief Justice. The man to fill it must appear before he is named, must be a messenger, or *vox clamantis*, as Marshall was, and as Taney was not. The drowning honour of that Court is under the water; it must be plucked up by the locks. . . . If the next Chief does not lift the department up, it will go to the bottom." [1] Prominent Republican organs presented the more radical, anti-slavery attitude towards the Court in the following partisan attacks.[2] The *New York Tribune* contended that the Court was the instrument of the slave power, which, "knowing that it would ultimately find no repose in the Legislative and Executive branches of the Government, has long had its eye upon the Supreme Court as its final hiding place from the avenging Spirit of Freedom. . . . When Marshall died, Benjamin F. Butler should have received the appointment. But it was given as a compensation to a politician who had not scrupled to perform a high-handed act at the dictation of the Executive. From that hour, the Court lost caste with the country. Calhoun fixed his eagle eye upon it, and resolved to make it the subservient hack of the negro propaganda. . . . Two new seats were created under Jackson. Van Buren filled them with Catron and McKinley, both extreme slaveholders — the former a respectable jurist, the latter a grovelling

and far abler than (high as he stands) he is yet known to be." See also letter of John Randolph Tucker, June 13, 1860, as to Z. Collins Lee as a candidate.

[1] *Sumner*, III, 335, letter of June 26, 1860.

[2] *New York Tribune*, March 26, 1859; *New York Courier*, Jan. 22, 1861; see also *Philadelphia North American*, March 15, 1859, Jan. 21, 1860.

partisan. And now the Court consisted of five slaveholders and four non-slaveholders with the unscrupulous Taney at its head. And thus it remains to this day. . . . This Court, as now arranged, is scandalously sectional, grossly partial, a mockery of the Constitution, a serf of the slave power, and a disgrace to the country. A truly National Administration will not fail to reform it so as to regain for it the confidence of the people, by adapting it to the ends for which it was created." The *New York Courier* stated that: "The attention of all those of our people who are solicitous to hand down to posterity the inheritance of freedom we received from our forefathers should be drawn to the action of the Supreme Court. Sitting away from popular notice in a secluded nook of the Capitol, we should see that they are not stealthily burrowing under the foundations of the Temple of Liberty. A decided majority of them are the appointees of the party that five sixths of the American people decided against at the last election; and there are no more inveterate sticklers for the predominance of that party in the whole land." It pointed out that three cases involving slavery were likely to be argued at the Term beginning in December, 1860, — one, an appeal from the Territorial Court of Kansas, which might require a decision as to the right of the people of the Territory to exclude slavery therefrom; the second, involving the duty of the Governor of Ohio to honor a requisition from the Governor of Kentucky for a fugitive who had violated the slavery laws of the latter State; the third, the famous *Lemmon Case*, an appeal from the New York Court of Appeals involving the status of a slave brought into that State.[1] This Republican paper, now citing and

[1] The *States and Union*, Jan. 29, 1861, said: "The House accepted yesterday the Senate amendment to the bill admitting Kansas into the Union. Thus the ulti-

adopting views urged in early days by Democrats like John Taylor of Caroline, Jefferson and Calhoun as to the dangers of the exercise of its power by the Court, contended that it had no authority to determine political questions, and spoke of the "delusion abroad as to the power and authority of this Court, that, if continued, may become fatal. It is clear that in all political questions (and the whole subject of slavery outside of a State is such) the decision of the people as to what the Constitution means is above the decision of the Supreme Court, and so the Supreme Court ought to determine, if it be desirous to respect the Constitution and our whole system of government, rather than the demands of party and its own *esprit de corps.*"

It was with such fundamental misconceptions prevalent at the North that the Court convened on December 3, 1860, for the Term which was to end in war and in the disappearance of the slavery issue from its docket.[1] Its first session was held in a new Court-room; and no longer could its surroundings be described as they had been by a newspaper correspondent the previous year: "You walk along a narrow passage lighted with a dim lamp. You enter, and, crowding between two walls of old deal boxes, see a distant glass door, a general gloom. . . . Descending two or three steps, you are ushered into a queer room of small dimensions and shaped overhead like a quarter section of a pumpkin shell, the upper and broader rim crowning three windows, and the lower and narrower com-

mate decision of the Supreme Court will be had upon the question of the right of a Territorial Legislature to abolish slavery."

As to the early stages of the *Lemmon Case*, see especially *Washington Union*, Jan. 1, 1853; *Law Reporter* (1860), XXIII.

[1] *New York Tribune*, Dec. 4, 1860: "The Supreme Court met in their new chamber at noon. Chief Justice Taney and all the Associate Justices were present except Judge Wayne. The Court shortly adjourned, and the Judges proceeded to the White House personally, and paid their respects to the President, and afterwards left their cards for the Vice-President."

ing down garret-like to the floor — the windows being of ground glass, the light trickling through them. . . . We would not speak disrespectfully of the Supreme Court. We recently entered its sacred precincts in company with an irreverent Western lawyer. After gazing around a moment, he exclaimed: 'I don't wonder at that decision in the *Dred Scott Case*. Why! What a potato hole of a place, this! The old men ought to be got up above ground where they can breathe fresh air and see real daylight once in a while!'"[1] The project for the provision of more commodious quarters for the Court had been long under consideration;[2] and finally in 1860, when the new wings were added to the Capitol for the Senate and the House, Congress appropriated $25,000 for the alteration and finishing of the former Senate Chamber for use as a Court-room, with twelve other rooms for the use of the Court, its officers and records.[3]

During this Term beginning in December, 1860, the uncertain political conditions throughout the country and the approach of war cast a gloom over the session.

[1] *New York Tribune*, March 16, 1859.

[2] In 1850, in a report on the extension of the Capitol by Robert Mills, architect, May 1, it was proposed that the Senate should occupy a new Chamber in a new wing and that "the Court should be comfortably and elegantly accommodated in the present Senate Chamber." It was stated that the members of the Court had suffered much from the inconvenience of its Court-room, and from its location, which had proved injurious to health. "The deaths of some of our most talented jurists have been attributed to this location of the Court-room; and it would be but common justice in Congress to provide better accommodation for its sittings." See also *35th Cong., 2d Sess.*, 1579, March 2, 1859; *ibid.*, 2829, June 11, 1860.

Gideon Welles in his diary, March 5, 1863, said: "I subsequently went into the Senate Chamber, a much larger but less pleasant room than the old one, which I first visited in the last days of the second Adams. If the present room is larger, the Senators seemed smaller. My first impressions were doubtless more reverential than those of later times." *The Diary of Gideon Welles* (1911), I, 244.

[3] Act of June 25, 1860; by the Act of April 7, 1866, $6500 was appropriated to fit up rooms in the basement under the new Supreme Court-room for a consultation room for the Court. In a report by the United States Art Commission, Feb. 22, 1860, it was proposed that the new Court-room "may appropriately be decorated with subjects relating to the judicial history of the country." Fortunately, this proposal was never carried out. *Documentary History of the Capitol* (1904), 746.

Frequent references to the situation were made by counsel; and a striking instance of their forebodings occurred in an argument on December 23, 1860, by an eminent lawyer from Texas, George W. Paschal, whose sentiments as reported in the press "produced a profound sensation and brought many of the venerable barristers to their feet to congratulate the Texan upon his patriotic sentiments", when he concluded as follows:[1]

We stand upon the brink of another revolution. . . . The probable indication is that, before the mandate of this Court goes down, Texans may have decreed, so far as in them lies, that this Court has no longer jurisdiction to enforce the Constitution and the laws under which the cause was tried; that the Judge and counsel who tried it and the Germans who have been naturalized are no longer bound by the oaths which they voluntarily took to support the Constitution of the United States, but that all have fallen under a revolution said to be necessary to sever the ties which bind us to the Union, which Texans voluntarily joined and which they now threaten to leave. . . . I own that I have argued the case under the deep melancholy which such events naturally impose. . . . Heaven grant that I may be wrong in my apprehensions and may Texas be long preserved as a member of the Union in which she has had a colossal growth! Already, she has many monuments which chronicle bloody dramas in contending revolutions, and may we find protection for every right which the Union was intended to afford! While we have an ultimate appeal here, I should have no fears.

President Buchanan, having decided to fill the vacancy on the Bench caused by the death of Judge Daniel,

[1] *National Intelligencer*, Dec. 29, 1860; *Chandler* v. *Von Roeder*, 24 How. 224, decided Jan. 21, 1861. President Buchanan, Dec. 15, 1860, issued a proclamation for a day of fasting and prayer on Jan. 4, 1861, in which he stated: "Hope seems to have deserted the minds of men" and that "God's arm alone can save us from the awful effects of our own crimes and follies!" Referring to this proclamation, the *New York Evening Post*, Dec. 17, 1860, said that Reverdy Johnson made "some appropriate remarks in the Supreme Court, in which that distinguished advocate prays that Heaven may silence the 'whinings of imbecility now discouraging and sickening the honest public heart.' Mr. Johnson is not, it may be remarked, a very ardent admirer of the President's."

and having considered the appointment of Caleb Cushing of Massachusetts, finally, on February 5, 1861, selected for the position Jeremiah S. Black of Pennsylvania.[1] Black was fifty-one years of age; he had served for six years as Judge and Chief Justice of the Pennsylvania Supreme Court, Attorney-General of the United States from 1857 to 1860, and Secretary of State since December 17, 1860. Though a man of hot temper, his legal qualifications were eminent; and had the nomination been made a few months earlier, as had been expected, it would probably have been confirmed. But now, owing to the vacancies in the Senate due to resignation of Senators from seceding States, and further owing to the bitter opposition of Stephen A. Douglas and his followers, confirmation was doubtful. The Republicans, moreover, were insistent that, as the Democrats had turned down Crittenden and Badger whose appointments had been made in the closing days of Whig Administrations, they should now take their own medicine and leave the place to be filled by President Lincoln. The anti-slavery press was savage in its criticism of Black. "In all the extensive range of his most unhappy selections for office, Mr. Buchanan has never hit upon a single nomination more eminently unfit to be made," said the *New York Tribune;* and it alleged that Black had neither the judicial qualities, the vigorous intellect nor the calm or dignified character required for the position, and that the nomination was "a flight of insolence so extraordinary as to partake of some of the most captivating traits of the imagination!" The Senate, by a vote of twenty-five to twenty-six, rejected the nomination on February 21; and while at the very last moment Buchanan considered appoint-

[1] *Philadelphia Press*, Jan. 17, 24, Feb. 5, 6, 28, 1861; *New York Tribune*, Jan. 29, Feb. 7, 20, 1861.

ing either John M. Reed of Pennsylvania or Joseph Holt of Kentucky, he finally decided to take no further action.[1]

As soon as President Lincoln was inaugurated, it was rumored that he intended to appoint the veteran statesman, John J. Crittenden of Kentucky, and this choice was hailed as highly felicitous. Not only was Crittenden a great lawyer, but he had been recently one of the most active supporters of an attempt to avert civil war by means of the famous Crittenden Compromise, in January, 1861. "His recognition by the Administration would be received with joy all through the Border States," said one conservative Republican paper. "As a stroke of policy, the appointment of Mr. Crittenden at this time will be most fortunate for the future peace of the country," said another, "as it could hardly fail to disarm the disunionists in the Virginia Convention instantly, so far as stripping them of power to work future mischief in the Border States is concerned. It would be a practical, tangible explanation of the purpose of the new Administration not to aggress the South, which every Southern man would instantly comprehend, despite the intrigues of the disunionists longer to deceive them on that really now most important point."[2] Opposition to Crittenden, however,

[1] *Executive Journal of the Senate*, XI; *Philadelphia Press*, March 2; *New York Times*, Feb. 20, 1861. One cause of Black's failure was the opinion which he had given as Attorney-General, Nov. 20, 1860, as to the lack of power in the President to prevent a State from seceding; see editorial in *New York Evening Post*, Dec. 10, 1860.

[2] *Philadelphia Press*, March 8, 11, 13, 16, April 5, 9, 1861; *Washington Star*, March 6, 7, 8, 1861; *New York Times*, Feb. 26, March 7, 1861, said: "Nothing would so reassure conservative Southern men as the appointment of Crittenden." *The States and Union*, March 7, said the appointment "would bring considerable strength to the new Administration," and on March 4, it said that the radicals were making "a vindictive effort to rob the Administration of the honor of so wise an appointment" and that Senator Trumbull was Crittenden's most active antagonist." E. M. Stanton wrote to Buchanan, March 10, 1861, that on the day after the confirmation of the Cabinet, "Mr. Seward sent for me and requested me to draw up a nomination for Mr. Crittenden for Judge of the United States Court. I did

developed among the more radical, anti-slavery Republicans; and the names of Thomas Ruffin of North Carolina, Joseph Holt of Kentucky and George E. Badger of North Carolina began to be mentioned.

Meanwhile, the last day of the Court's session on the momentous eve of war occurred on March 14, 1861, ten days after Lincoln's inauguration. "The Court adjourns today. I am now writing in the Supreme Court-room. If the Court ever reassembles, there will be considerable change in its organization," wrote Edwin M. Stanton to Buchanan. "There has been no further action in respect to the Supreme Judgeship. It is generally understood that Crittenden will not be nominated. Judge Campbell has reconsidered his resignation and will not resign immediately. Judge Grier went home sick, two days ago. Judge McLean is reported to be quite ill. Lincoln will probably (if his Administration continues four years) make a change that will affect the constitutional doctrines of the Court. . . . The Supreme Court has just decided . . . that the Federal Government has no power to coerce the Governor of a State to return a fugitive from justice, although it is his duty to comply with the demand." The decision referred to by Stanton as rendered on this last day of the Term was *Ex parte Kentucky* v. *Dennison*, 24 How. 66, in which the State of Kentucky had brought a petition for mandamus in the United States Supreme Court to compel the Governor of the State of Ohio to honor a requisition of the Governor of Kentucky for the surrender of a violator of a State law relative to slaves. The Court held that though the

so and gave it to him. My understanding was that the nomination would be immediately sent in. But it has not been sent, and the general understanding is that it will not be. The rumor is that the red blacks oppose it, and also many of the Democrats, and that Mr. Holt will be nominated. He appears now to be the chief favorite of the Republicans." *Works of James Buchanan*, XI.

Constitution provided that "it shall be the duty" of the Governor of a State to deliver up fugitives from justice, these words were merely "declaratory of the moral duty" and that no power was delegated "to the General Government, either through the judicial department or any other department, to use any coercive means to compel him." [1] The decision will strike most people, said the *New York Evening Post*, "as much like that message of Mr. Buchanan's, of which Mr. Seward gave so just and pithy a rendering: 'that a State has no right to secede, but no one has a right to prevent it; and that the laws of the United States must be enforced, but there is no authority to enforce them.' Justice Taney says, in effect, that the Governor of Ohio ought to give up the fugitive, but if he will not, there is no authority to make him do so. The real point in question, however, is whether a fugitive demanded by one State shall be given up by another, when the offence is no offence against the laws of the State asked to surrender him, or against the law of nations." Though the decision gave considerable dissatisfaction to the slave States, it was rendered at a date too close to the verge of war to have any effect on the development of the slavery issue.

Two other decisions rendered at this time were important as showing that the Court was still to be depended upon to sustain the supremacy of the jurisdiction of the National Government, which the Chief Justice had so staunchly upheld in the *Booth Case*, two years before. In *Freeman* v. *Howe*, 24 How. 450, property attached by a United States marshal in a suit in a Federal Court was seized on replevin by a State sheriff on process issued from a State Court in a suit by bondholders.

[1] *National Intelligencer*, Dec. 18, 1860; *New York Evening Post*, March 14, 15, 1861; see also *National Republican* (Wash.), March 15, 16, 1861.

The Court, through Judge Nelson, said: "No Government could maintain the administration or execution of its laws, civil or criminal, if the jurisdiction of its judicial tribunals were subject to the determination of another. . . . It belongs to the Federal Courts to determine the question of their own jurisdiction, the ultimate arbiter, the supreme judicial tribunal of the Nation."[1] In *Almy* v. *California*, 24 How. 169, involving the validity of a State stamp tax on bills of lading of all gold transported from within to without the State, and argued by Montgomery Blair against Judah P. Benjamin, the Chief Justice had occasion to render an opinion, rejecting his own unsuccessful argument as counsel in *Brown* v. *Maryland* in 1827, and holding that such a tax was a tax on exports within the prohibition of the Constitution.[2]

One month from the date of the adjournment of the Court, the advent of war by the attack on Fort Sumter on April 12 seemed to put an end to all consideration of judicial questions or of judicial appointments Nevertheless, within six weeks after the opening gun was fired, the status of the Judiciary as the defender of the rights of the citizen, in war as well as in peace, became an active issue, when Chief Justice Taney, sitting in the United States Circuit Court, was brought into direct conflict with the President, by his famous decision in *Ex parte Merryman.* In this case, a prominent citizen of Baltimore who had been arrested by the military on a charge of aiding the enemy and who had been imprisoned in Fort McHenry, had obtained a writ of habeas

[1] In *Buck* v. *Colbath*, 3 Wall. 334, the Court said that the *Freeman* v. *Howe* decision "took the profession generally by surprise, overruling as it did the unanimous opinion of the Supreme Court of Massachusetts . . . as well as the opinion of Chancellor Kent."

[2] See as to this case, *Woodruff* v. *Parham*, 8 Wall. 123, 138; *Champion* v. *Ames*, 188 U. S. 321, 349.

corpus from the Chief Justice. The officer in charge of the prisoner having declined to obey the writ on the ground that he was authorized by the President to suspend the writ of habeas corpus for the public safety, Taney at once issued an attachment for contempt. Its service being prevented by the military, Taney proceeded to file an opinion holding the suspension of the writ by the President to be in violation of the Constitution, and ordered the Clerk of the Court to transmit a copy of the opinion to the President.[1] The case thus involving the powers of the Executive with respect to the liberty of the citizen excited intense interest throughout the country.[2] Once more, as in 1857, criticism and denunciation of the harshest kind were leveled at the aged Chief Justice; and many Republican papers even questioned his loyalty to the Union. "The Chief Justice takes sides with traitors, throwing around them the sheltering protection of the ermine," said the *New York Tribune.* "When treason stalks abroad in arms, let decrepit Judges give place to men capable of detecting and crushing it"; and it stated that Taney's decision tended "to bring the ermine into contempt with the great body of loyal citizens. The appropriate sphere of this writ is the Courts. It is out of place in the camp. Originally intended to secure the liberty of loyal men, it would be a gross perversion of its powers

[1] Tyler states in his *Memoir* of Taney that the Chief Justice, as he left the house of his son, remarked that it was likely that he should be imprisoned in Fort McHenry before night, but that he was going to Court to do his duty. About the same time, Judge Treat of the United States District Court in St. Louis issued a writ of habeas corpus in the case of Capt. Emmet Macdonald, who had been arrested and imprisoned by Gen. Harvey, on charges of treason, and after lengthy arguments an order for Macdonald's discharge was issued and finally complied with by the Army; see especially, *Missouri Democrat,* May 16, 23, 24, 27, 28, 29, June 1, 3, 4, 7, 10, 1861; *National Intelligencer,* May 29, 1861.

[2] *New York Times,* May 29, 30, 1861; *New York Tribune,* May 29, 30, 31, 1861; *Philadelphia Press,* June 5, 6, 1861; *New York World,* May 29, June 5, 1861; *Missouri Democrat,* June 3, 1861, editorial on "Military Despotism as a Bug Bear"; *New York Evening Post,* May 29, June 4, 1861.

to employ it as the protecting shield of rebels against a constitutional government. . . . No Judge whose heart was loyal to the Constitution would have given such aid and comfort to public enemies. . . . Let us not be afraid of military despotism. . . . Of all the tyrannies that afflict mankind, that of the Judiciary is the most insidious, the most intolerable, the most dangerous." The *New York Times* said that no man knew better than Taney that he was perverting the uses of the writ and prostituting its purposes. "Too feeble to wield the sword against the Constitution, too old and palsied and weak to march in the ranks of rebellion and fight against the Union, he uses the powers of his office to serve the cause of the traitors." The *New York Evening Post* said that Taney was using "his authority and position to the advantage of those who are armed against the Union," and "to serve treason, and embarrass and injure the Government." The *Philadelphia Press* said that Taney's opinion bore every evidence of having been prepared with intention to embarrass the President; and that his sympathies were evidently neither with the Union nor with the President in his efforts to save the Union. "That which curbs tyranny should speed patriotism and crush treason. . . . If his action is an indication of his future course, treason will find a place of refuge, and its abettors encouragement and sympathy, in the Supreme Court." The *Missouri Democrat* spoke of the "meddling and traitorous efforts to thwart the efficiency of the Government in its hour of peril. . . . If the Government will follow up the suspension of the writ of habeas corpus with the dispension of . . . Taney it will be a good riddance for the country."

Derogatory views of this kind were not by any means universal; and many staunch Republican organs com-

mended Taney's action in behalf of personal liberty.[1] "We are not sorry to see the Judiciary declare its opinion, or even enter its protest against acts which it believes to be without authority," said the *Boston Advertiser*. "If in any point the limits of the Constitution are overstepped, we desire that the excess should not be overlooked, but that it should be entered upon the record, to stand as a warning, in more peaceful times yet to come, that here is an act, the necessity of which was the justification, and which is not to be made a precedent at any time when the public exigency is less pressing." The *Cincinnati Commercial*, which had in previous years bitterly assailed Taney, acknowledged that in this case he had done only what the law required of him, and that denunciations were now unjustified; and it stated that, while the offense committed by Merryman was unquestionably heinous, "it does appear to us that he could have been held and punished by the civil power. . . . The very fact that we are placed in circumstances so critical as to render the application of the severest remedies sometimes justifiable should guard us against resorting to military rule. . . . Let us have no dictation from the Army, so long as we can have justice administered from her customary seat." The *Baltimore American* took the same view of the situation. "The plea of State-necessity may be advanced by the President to justify himself for so high-handed an act as the suspension of the writ; . . . but it would not be well for the highest officer of the Government to justify a plain violation of the Constitution, while calling out troops to maintain

[1] *Boston Daily Advertiser*, May 30, 1861; *National Intelligencer*, May 30, June 4, 8, 22, 1861; *Cincinnati Commercial*, May 29, June 3, 1861; *Baltimore American*, May 29, June 4, 1861; The *Washington Star*, May 29, 1861, said that the action of Chief Justice Taney in this case was probably in accordance with the strict letter of the law but that it was to be sincerely regretted that he had refused to take into consideration the revolutionary state of the country.

that same Constitution inviolate. . . . It is eminently proper that a Government which is fighting to maintain the integrity of the Constitution should interpose no arbitrary action to suspend or interfere with rights plainly guaranteed under it, if it would have the support and countenance of its citizens."

While the legal controversy which raged in 1861 over the constitutional right of the President to suspend the writ of habeas corpus has never been settled by judicial decision or public opinion, the right and the duty of the Chief Justice to issue the writ and to consider the legal question involved is now universally admitted.[1] And history has recorded as its verdict that (as stated by one of his biographers) "there is nothing more sublime in the acts of great magistrates that give dignity to Governments than this attempt of Chief Justice Taney to uphold the supremacy of the Constitution and civil authority in the midst of arms"; and (as another wrote): "Taney's action in this case was worthy of the best traditions of the Anglo-Saxon Judiciary. There is no sublimer picture in our history than this of the aged Chief Justice, the fires of Civil War kindling around him, the President usurping the powers of Congress, and Congress itself a seething furnace of sectional animosities, serene and unafraid, while for a third time in his career, the storm of partisan fury broke over his devoted head, interposing the shield of the law in the defense of the liberty of the citizen." [2]

President Lincoln, however, steadfastly adhered to

[1] See among many publications published in 1861 and 1862 on this subject: *The Privilege of the Writ of Habeas Corpus*, by Horace Binney; article by Reverdy Johnson in the *Weekly National Intelligencer*, June 20, 1861; *Habeas Corpus and the Law of War and Confiscation*, by S. S. Nicholas; *Review of Binney on the Habeas Corpus*, by J. C. Bullitt; *Habeas Corpus and Martial Law*, by Joel Parker; and see especially *Suspension of Habeas Corpus during the War of the Rebellion*, by Sydney G. Fisher, *Pol. Sci. Quar.* (1888), III.

[2] *Roger B. Taney*, by William E. Mikell, in *Great American Lawyers* (1905), IV, 188; *Tyler*, 420–432.

the theory that in time of war the necessities of the emergency were supreme; and accordingly, during the two years following the *Merryman Case*, a series of steps were taken by the President and by the Secretary of War in instituting censorship, military arrest and military trial, violative of the principles laid down by Taney, and which, while possibly justified by war conditions, have since been held to have been in excess of constitutional authority.[1] Lincoln's theory was eloquently set forth by him in a letter in 1863 as follows: "Thoroughly imbued with a reverence for the guaranteed rights of individuals, I was slow to adopt the strong measures which by degrees I have been forced to regard as being within the exceptions of the Constitution and as indispensable to the public safety. . . . I concede that the class of arrests complained of can be constitutional only when in cases of rebellion or invasion the public safety may require them; and I insist that in such cases they are constitutional wherever the public safety does require them, as well in places in which they may prevent the rebellion extending as in those where it may already be prevailing." [2] This

[1] See the censorship orders of July 8, Oct. 22, 1861, and Feb. 25, 1862, issued by the Secretary of War and the Secretary of State; the Executive Order of Feb. 14, 1862, by the Secretary of War as to military arrests; the President's Order of April 27, 1861, and his Proclamation of Sept. 24, 1862, suspending habeas corpus; the Suspension of Habeas Corpus Act of March 3, 1863. Congress by the Act of March 3, 1863, the Act of May 11, 1866, and the Act of March 2, 1867, attempted to confirm and validate the acts of President Lincoln and Secretary Stanton and of military officers acting in accordance with their orders in making military arrests, etc. These statutes were involved in *Beard* v. *Burts*, 95 U. S. 434, in 1877, and in *Bean* v. *Beckwith*, 98 U. S. 266, in 1878; but the Court did not pass on the question of their constitutionality; see especially *Springfield Republican*, Jan. 9, 1879.

[2] *Complete Works of Abraham Lincoln* (1905), VIII, letter to Erastus Corning, June 12, 1863. It is interesting to note that one other Court had the courage to deny Lincoln's theories. The Supreme Court of Wisconsin, the very tribunal which had so long defied Chief Justice Taney's assertion of the supremacy of the National power in the *Booth Case*, in January, 1863, rendered an opinion in *In re Kemp*, 16 Wisc. 359, in which it upheld Taney's views in the *Merryman Case* as "unanswerable", and held that the President had no power to suspend the writ of habeas corpus; see *The Story of a Great Court* (1912), by John B. Winslow.

exaltation of the Executive over the law greatly depressed the aged Chief Justice throughout the remaining years of his life; and he wrote, in 1863, that he saw no ground to hope that the Court would "ever be again restored to the authority and rank which the Constitution intended to confer upon it. The supremacy of the military power over the civil seems to be established, and the public mind has acquiesced in it and sanctioned it." The apprehension so expressed as to the trend of events was unquestionably shared by many Senators and Representatives in Congress, even in the President's own party.[1] Yet such is the sturdiness of the American Judiciary and the vitality of the American belief in and insistence upon the rights of constitutional liberty, that, had the Chief Justice lived but four years after writing his note of pessimism, he would have seen the doctrines laid down by him in the *Merryman Case* strongly upheld. For in *Milligan's Case*, the Court composed largely of Republicans, unanimously joined in denouncing as highly illegal the Executive establishment of military tribunals in States where the civil Courts were open. Never did a fearless Judge receive a more swift or more complete vindication.

On December 2, 1861, when the Court met for its annual session, there were three vacancies; for Judge Daniel's successor had not been appointed, Judge McLean had died on April 4, 1861, and Judge Camp-

[1] For a summary of Congressional criticism of the President, see *Lincoln's Despotism*, by Charles Warren, *New York Times*, May 12, 1918. See also *The Diary of Gideon Welles*, I, Sept. 15, 1863: "I think I am not mistaken in my impression that Mr. Chase is one of those who has claimed that the President had the constitutional right to suspend the privilege of this writ, yet he was today sensitive beyond all others in regard to it and proposed relying on the Act of Congress (of March 3, 1863) instead of the constitutional Executive prerogative. He feared if the President acted on Executive authority a civil war in the Free States would be inevitable; fears popular tumult, would not offend Congress, etc. I have none of his apprehensions, and if it is the duty of the President, would not permit legislative aggression, but maintain the prerogative of the Executive."

bell had, with great reluctance, decided that his duty impelled him to follow his State of Alabama out of the Union. While believing in secession as a constitutional right, Campbell had strongly opposed it as a policy; and his efforts through the winter and spring of 1860–1861 to avert war had been active and unremitting.[1] With the outbreak of war, however, he felt that it was his duty to resign, and that his continuance on the Bench would lead to a lack of confidence by the public in his opinions. Accordingly, he wrote to the Chief Justice, April 29, 1861: "Some days ago, I sent through the mail to the President a notice of my resignation. . . . In taking leave of the Court, I should do injustice to my own feeling, if I were not to express to you the profound impression that your eminent qualities as a magistrate and jurist have made upon me. I shall never forget the uprightness, fidelity, learning, thought and labor that have been brought by you to the consideration of the judgments of the Court, or the urbanity, gentleness, kindness and tolerance that have distinguished your intercourse with the members of the Court and Bar. From your hands, I have received all that I could have desired, and in leaving the Court, I carry with me feelings of mingled reverence, affection and gratitude. In the prayer that the remainder of your days may be happy and their end peace, I remain your friend." [2] The loss thus sustained by the Bench was noted by the *National Intelligencer*, which termed Campbell "a learned jurist and a faithful

[1] Stanton writing to Buchanan in May, 1861, said that "the *New York Evening Post* is very severe on Judge Campbell, and very unjustly so, for the Judge has been as anxiously and patriotically anxious to preserve the Government as any man in the United States, and he has sacrificed more than any other Southern man, rather than yield to the Secessionists." *John Archibald Campbell* (1920), by Henry G. Connor. The *New York Tribune*, Nov. 27, 1860, said: "Every Judge on the Bench is for the Union." See also *The States and Union*, Jan. 16, 26, 1861.

[2] *Maryland Hist. Mag.* (1910), V.

Judge, who during the entire period of his official service has illustrated the qualities which must adorn the exalted position he was called to fill, and who, in his retirement, will carry with him the admiration of his countrymen."

President Lincoln hesitated at first to fill these vacancies on the Bench. His characteristically just attitude towards the South was shown in his first Message to Congress, December 3, 1861, in which he said: "Two of the outgoing Judges resided within the States now overrun by revolt, so that if successors were appointed in the same localities, they could not now serve upon their Circuits; and many of the most competent men there would not take the personal hazard of accepting to serve even here upon the Supreme Bench. I have been unwilling to throw all the appointments Northward, thus disabling myself from doing justice to the South on the return of peace." [1]

The gloomy conditions under which both the Court and Congress convened at this December Term of 1861 were impressively alluded to by Attorney-General Bates, December 3, in presenting the resolutions of the Bar on the death of Judge McLean:

> Since the first organization of this Court, no Term has yet been held under circumstances so gloomy and sorrowful. I look up to that honored Bench and behold vacant seats. Even this august tribunal, the co-equal partner in the government of a great Nation, the revered dispenser of our country's justice, shares with us in feeling the common sorrow, and suffers in the common calamity. It is shorn of its fair proportions, and weakened and diminished in its strength and beauty, by the present loss of one entire third of its competent members. And where are the wise, learned, and

[1] Lincoln pointed out at the same time that the whole judicial system ought to be revised, and that Wisconsin, Minnesota, Iowa, Kansas, Florida, Texas, California and Oregon should be brought within some judicial Circuit, and provided with Circuit Courts.

just men who used to fill those seats? Gone from this theatre of their fame and usefulness, while all of us remember them with respect and gratitude, and mourn the loss of their valuable services. Two of them have been peacefully gathered to their fathers, and have left their fame safe and unchangeable beyond the reach of malice, and secure against accident, embalmed in history, and narrowed by the grave. And one of them, in the ripe vigor of his manhood, and in the pride of a noble and highly cultivated mind, has been swept away from his high position by the turbulent waves of faction and civil war. And this is not all. Your lawful jurisdiction is practically restrained; your just power is diminished, and into a large portion of our country your writ does not run and your beneficent authority to administer justice according to law is, for the present, successfully denied and resisted. I look abroad over the country and behold a ghastly spectacle; a great nation, lately united, prosperous, and happy and buoyant with hopes of future glory, torn into warring fragments; and a land once beautiful and rich in the flowers and fruits of peaceful culture, stained with blood, and blackened with fire. In all that wide space from the Potomac to the Rio Grande, and from the Atlantic to the Missouri, the still, small voice of legal justice is drowned by the incessant roll of the drum, and the deafening thunder of artillery. To that extent, your just and lawful power is practically annulled, for the laws are silent amidst arms. . . . Now, indeed, we are overshadowed with a dark cloud, broad and gloomy as a nation's pall; but thanks be to God, the eye of faith and patriotism can discern the bow of promise set in that cloud, spanning the gloom with its bright arch, to foreshow the coming of a day of sunshine and calm, and to justify our hope of a speedy restoration of peace, and order, and law.

At this Term, few cases of importance were decided, other than California land claims.[1] In *Jefferson Branch*

[1] See especially *United States* v. *Vallejo*, 1 Black, 541; *United States* v. *Castillero*, 2 Black, 1, involving the title to the rich quicksilver mines in New Almaden, California, decided in 1863. For an elaborate and interesting account of these California land frauds, "a system of extensive frauds with forged grants and perjured witnesses such as the world has seldom witnessed", as Judge Grier said in the *Vallejo Case*, see arguments of counsel in *De Haro* v. *United States*, 5 Wall. 599, in 1869;

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Bank v. *Skelley*, 1 Black, 436, the State of Ohio again attempted to induce the Court to reverse its position as to the power of a State to tax banks, which by a prior statute had been exempted from taxation; but the Court said that though it was aware that its view had not been satisfactory to all persons, "it has been adhered to by this Court in every attempt hitherto made to relax it; and we presume it will be, until the historical recollections, which induced the framers of the Constitution to inhibit the States from passing any law impairing the obligation of contracts, have been forgotten."

Shortly after the opening of the December Term of 1861, the precarious state of health of both Taney and Catron and the consequent retardation of the work of the Court made it imperative that one of the existing vacancies should be filled. Accordingly, on January 22, 1862, President Lincoln appointed in Judge McLean's place Noah Haynes Swayne of Ohio. Swayne was fifty-seven years old; though without previous judicial experience, he held an eminent position at the Ohio Bar, and his appointment had been vigorously urged by Governor Dennison, Senator Sherman and Senator Wade.[1] Appointments to fill the vacancies caused by the death of Judge Daniel and the resignation of Judge Campbell were postponed until Congress should have come to a final decision as to the redistribution of the Circuits, made necessary by the disappearance of the two which comprised the seceding States. It was rumored that the appointees for the new Circuits would be Senator Orville H. Browning of

see also later the notorious McGarrahan claims involved in *United States* v. *Gaines*, 23 How. 326, 1 Wall. 690, 3 Wall. 752; *McGarrahan* v. *Mining Co.*, 96 U. S. 316.

[1] *New York Evening Post*, Jan. 27, 1862; the *New York Tribune*, Jan. 23, 1862, termed Swayne "one of the ablest lawyers in Ohio." Swayne was confirmed by the Senate, Jan. 24, 1862, by a vote of 38 to 1.

Illinois and Caleb B. Smith of Indiana, Lincoln's Secretary of the Interior. Owing to personal opposition to these candidates and to State jealousies, the method of grouping the Western and Southwestern States became a subject of warm controversy in Congress; the House and the Senate adopted different plans; and it was not until the very end of the session, that on July 15, 1862, an agreement was reached and an Act passed reorganizing the Court.[1] To fill one of the new positions the President appointed, on July 16, Samuel Freeman Miller of Iowa. Miller was forty-six years old, an outstanding figure at the Bar west of the Mississippi River, though little known to the country at large, and in no sense a National figure; but his appointment had been vigorously urged by the lawyers of Iowa, Minnesota, Kansas and Wisconsin, by the Governor and Senators and Representatives of Iowa, and by a petition signed by one hundred and twenty-nine out of one hundred and forty Congressmen and twenty-eight out of thirty-two Senators.[2] To the other Judgeship, the President made no appointment for several months. The Bar of Illinois urged the name of Thomas Drummond; that of Michigan, William A. Howard; and

[1] See *37th Cong., 2d Sess.*, July 4, 1862, especially speeches of Senator Trumbull and Senator Wright. The Circuits were finally composed as follows: (6th, Catron's) Ky., Tenn., Ark., Tex., La.; (7th, Swayne's) Ind., Ohio; (8th) Ill., Wisc., Mich.; (9th) Minn., Ia., Kans., Mo. The *New York Tribune*, July 14, 1863, said that by the inclusion of Ohio and Indiana in Swayne's Circuit the opponents of Smith and Browning were successful; that by the union of Wisconsin and Illinois, both Browning and Senator James R. Doolittle (of Wisconsin) were put out of the question, as Michigan was added, in the expectation that its influence would defeat both. "Browning, whose prospects were, until he took ground against the most important Republican measures, considered the best, has been the Jonah of the bill, everybody trying to throw him overboard."

[2] *Samuel Freeman Miller*, by Charles N. Gregory, *Iowa Biog. Series* (1907), *Yale Law Jour.* (1908), XVII; see also article by Horace Stern in *Great American Lawyers* (1908), VI. So little known was Miller that the *New York Tribune* said editorially, July 18, 1862: "Mr. Miller's name is printed 'Samuel' in the despatches but we presume it is 'Daniel F. Miller', the first Whig member of Congress ever chosen from Iowa."

that of Wisconsin, James R. Doolittle. Finally, Lincoln chose his close personal friend, David Davis of Illinois, who was appointed on December 1, and confirmed on December 8, 1862. Davis was forty-seven years of age, and had been for fourteen years a Judge of the Eighth Judicial Circuit in Illinois.[1]

The next spring, by the Act of March 3, 1863, Congress established a new (Tenth) Circuit comprising California and Oregon, and a tenth Associate Judge; and to this position, the President appointed, on March 6, Stephen Johnson Field of California, who was confirmed by the Senate, March 16. Field was forty-six years of age and had served as Judge and Chief Justice of the Supreme Court of California. Though a Democrat in politics, he had been a strong Union man, and his appointment, requested by the whole California delegation, was received with hearty applause throughout the country, regardless of politics — "a fine, general scholar and a thorough lawyer", said the *New York Evening Post*, "probably better acquainted with that mixed system of law, Mexican, Spanish and American, which prevails in California, than any other man in the country. . . . He will long do honor to the position . . . and the Government will have no more determined supporter."[2]

The Term beginning in December, 1862, was a notable one in its effect upon the war. On March 10, 1863, the Court decided the group of cases known as the *Prize Cases*, 2 Black, 635, headed by the *Brig Amy Warwick*.[3] Not only were these the first cases arising

[1] *David Davis*, by Thomas Dent, *Amer. Law Rev.* (1919), LIII.

[2] *New York Evening Post*, March 11, 1863; see also *Cincinnati Daily Gazette*, March 14, 1863; *Stephen Johnson Field*, by John N. Pomeroy, Jr., *Great American Lawyers* (1908), VII.

[3] *National Republican*, March 10, 1862, said; "The object of this sitting of the Court was to announce its decision in the great *Almaden Case* and the *Prize Cases*. Besides the counsel for and against the Government there were present a large

out of the Civil War to be decided by this tribunal, but they were far more momentous in the issue involved than any other war case; and their final determination favorable to the Government's contention was almost a necessary factor in the suppression of the war. The problem presented to the Court was how to apply the rules of international and prize law affecting attempts by neutrals to violate a blockade established between separate political powers recognized as belligerents, to the situation presented in this war. The Government of the United States had heretofore acted upon the theory that the war was an insurrection, that there were not two belligerent parties, and that the political integrity of the country had not been modified.[1] The situation was greatly complicated by the facts that Seward as Secretary of State had inserted in his blockade proclamations, provisions unknown to international law; that he had taken the official position that "no war" existed; and that the Government itself was strenuously protesting against any recognition by foreign nations of the Confederacy as a belligerent.[2] If the Court should decide that the principles of international law applying in a war between belligerents did not control in this case, the Government's blockade

number of distinguished lawyers from different sections of the country besides a very intelligent and attentive audience including several ladies. The reading of the *Almaden Case* decision occupied from 11.30 A.M. to 2 P.M."

[1] *William Maxwell Evarts*, by Sherman Evarts, in *Great American Lawyers* (1908), VII.

[2] See *New York World*, March 17, 1863 *Diary* (1863), by Adam Gurowski, II, 146 *et seq.*, Feb. 19, 1863: "The counsel for the English and rebel blockade runners and pilferers find the best point of legal defence, in the unstatesmanlike and unlegal wording of the proclamation of the blockade, as concocted and issued by Mr. Seward, and in the repeated declarations contained in the voluminous correspondence of our Secretary of State, declarations asserting that no war whatever is going on in the Federal Republic. No war, — therefore no lawful prizes in the ocean. So, ignorance and humbug mark every step of this foremost among the pilots of a noble, highminded, but too confiding people. . . . When Mr. Seward penned this doleful proclamation of the blockade . . . he never had before his mind what a mess he generated, what complications might arise therefrom."

would be entirely ineffective. As Richard H. Dana, one of the Government's counsel wrote: [1]

These causes present our Constitution in a new and peculiar light. In all States but ours, now existing or that have ever existed, the function of the Judiciary is to interpret the acts of the Government. In ours, it is to decide their legality. The Government is carrying on a war. It is exerting all the powers of war. Yet the claimants of the captured vessels not only seek to save their vessels by denying that they are liable to capture but deny the right of the Government to exercise war power, — deny that this can be, in point of law, a war. So the Judiciary is actually, after a war of twenty-three months' duration, to decide whether the Government has the legal capacity to exert these war powers. . . . Contemplate, my dear sir, the possibility of a Supreme Court, deciding that this blockade is illegal! What a position it would put us in before the world whose commerce we have been illegally prohibiting, whom we have unlawfully subjected to a cotton famine, and domestic dangers and distress for two years! It would end the war, and how it would leave us with neutral powers, it is fearful to contemplate! Yet such an event is legally possible — I do not think it probable, hardly possible, in fact. But last year, I think there was danger of such a result, when the blockade was new and before the three new Judges were appointed. The bare contemplation of such a possibility makes us pause in our boastful assertion that our written Constitution is clearly the best adapted to all exigencies, the last, best gift to man.

The cases were argued for twelve days, February 10–25, by Attorney-General Bates, William M. Evarts and Charles B. Sedgwick of New York, Richard H. Dana of Boston, and Charles Eames of Washington, against James Mandeville Carlisle of Washington, Daniel Lord and Charles Edwards of New York and Edward Bangs of Boston. And the following graphic

[1] *Richard H. Dana* (1890), by Charles Francis Adams, II, 266 *et seq.*, letter of March 9, 1863.

description of Dana's argument and of its effect upon the Court was given by an auditor in the Court-room, recalling "the glow of admiration and delight with which they listened to that luminous and exquisite presentation of the status which armed the Executive with power to use the methods and processes of war to suppress the great rebellion. Dry legal questions were lifted into the higher region of international discussion, and the philosophy of the barbaric right of capture of private property at sea was, for the first time in the hearing of most of the Judges then on the Bench, applied to the pending situation, with a power of reason and a wealth of illustration, and a grace and felicity of style that swept all before them. After Mr. Dana had closed his argument, I happened to encounter Judge Grier, who had retired for a moment to the corridor in the rear of the bench, and whose clear judicial mind and finely cultivated literary taste had keenly enjoyed the speech, and, in a burst of unjudicial enthusiasm, he said to me, 'Well, your little *Two Years before the Mast* has settled that question; there is nothing more to say about it!'" [1] Dana himself wrote from Washington: "I have every reason to be satisfied with my argument and its results. The compliments I have received from the Judges and audience and counsel are quite too flattering to be put on paper. They seem to think the philosophy of the law of prize has been developed for the first time in its bearing on the present question." And later: "I have won Judge Grier's heart. He pats me on the shoulder and says I have cleaned up all his doubts and that it is the best argument he has heard for five years, etc. The Attorney-General seems quite overcome with his emotion on the subject, and cannot say enough. Seward is flat-

[1] *Richard H. Dana* (1890), by Charles Francis Adams, II, 269–270.

tering, and others." The judgment of the Court was delivered only fifteen days after the close of the argument; and while there was a division in the Court, it was not on political lines; for the three Judges appointed by President Lincoln, Swayne, Miller and Davis, joined with two of the old Court, Wayne and Grier, to make up the majority (Chief Justice Taney and Judges Nelson, Catron and Clifford dissenting). In giving the opinion of the Court, Judge Grier said that: "It is not necessary, to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents claims sovereign rights as against the other . . . and whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be 'unilateral.'" It was held that the President's proclamation of a blockade was a lawful exercise of his power to meet and suppress the war, "in the shape in which it presented itself." This decision was greeted by the press of the North with approval and relief.

There had been grave fears lest the Court, composed of a majority of the Judges appointed prior to the war, might embarrass the Administration, by denying the legality of President Lincoln's actions, many of which had been initiated without legislative sanction. A striking illustration of the apprehensions with which the result of the case had been awaited, appeared in an elaborate editorial consideration which the *New York Times* gave to the attitude of the "Copperheads" towards the Courts.[1] It stated that, beginning with the Merryman habeas corpus, appeals to the civil Courts had figured largely in the attempts made to

[1] *New York Times*, March 13, 1863; *New York World*, March 14, 17, 1863; *New York Tribune*, March 13, 1863; *National Republican*, March 11, 1863. See also *Law Reporter* (1863), 737, quoting letter from *Boston Advertiser*, Dec. 18, 1863.

embarrass and weaken the Government. It rejoiced that hitherto these attempts had failed, and that the Judges had generally shown a loyal spirit, and had had "both the heart and head to refuse coöperation with factious men," and had in habeas corpus proceedings been content to await the decision of the highest tribunal before releasing men under military arrest; and it further rejoiced that the hope of the "Copperheads" "to cast a vast burden upon the Treasury, by annulling the blockade proclaimed by the President before the meeting of Congress, is dashed by a decision that the President had a complete right to institute the blockade, without awaiting Congressional action." It found grounds for expecting the Court to uphold the legality of the Emancipation Proclamation; for, it said, "the Court distinctly recognizes the *jus belli*, the war power, against which so much passionate declamation has been expended. It is said that the President may exert this power by proclamation, and that all the sinews of war may thus be cut. It is difficult to see why the very broad language of the Court in respect to the proclamation of the blockade does not involve the constitutional validity of the proclamation against slave property. . . . It is our firm conviction that the Supreme Court would indorse the constitutional validity of every important act of the Executive or of Congress thus far in the rebellion." The *National Republican* rejoiced that the dissenting opinion of Judge Nelson had not prevailed, as it left "an unpleasant and unsatisfactory feeling of apprehension that the powers of the Government, as found in the Constitution, were not adequate to the high and imperative duties which devolved upon it, of using all possible means of crushing the war of the rebellion at the outset."

That the Court was insistent on upholding the arm of

the Government in its war operations was seen in another important decision, rendered on the same day with the *Prize Cases*, March 10, 1863, in *Bank of Commerce* v. *New York*, 2 Black, 620, strongly denouncing any interference by a State with the powers and functions of the National Government. In this case, the State of New York had attempted to tax the capital of a bank, part of which was invested in stock and bonds of the United States. The exercise of such attempted authority was held to be in derogation of the power of the Nation to borrow money, "one of the most important and even vital functions of the General Government . . . a means of supplying the necessary resources to meet exigencies in time of peace or war." While admitting that "there is and must always be a considerable latitude of discretion in every wise government in the exercise of the taxing power", Judge Nelson said that this principle would not warrant the trespass by a State upon the functions of the Nation; that while it might be difficult oftentimes to fix the true boundary between the two systems, "each is sovereign and independent in its sphere of action, and exempt from the interference or control of the other, either in the means employed or functions exercised"; and he added, "influenced by a public and patriotic spirit on both sides, a conflict of authority need not occur or be feared." The hope of the Copperheads "to damage the credit of the Government by subjecting its bonds to State and other local taxation is dashed", said the *New York Times*. The importance of the clear announcement of the principle asserted in this case, just at this period when the financing of the war was becoming increasingly difficult, cannot be overestimated.

That the Court, however, even in time of war, was

not inclined to acquiesce in any extension of National authority which it deemed unwarranted by the Constitution was seen in its attitude towards the provision of the Federal income tax law, imposing a tax upon the incomes of the Judges. In denial of the validity of such a tax, Chief Justice Taney wrote to the Secretary of the Treasury, saying that he would "not by any act or word or mind have it supposed that I acquiesce in a measure that displaces it (the Judicial Department) from the independent position assigned to it by the statesmen who framed the Constitution." The Secretary having ignored this communication, the Court itself, on the day of the decision of the *Prize Cases*, March 10, 1863, ordered a copy of the letter to be entered on its records.[1]

At the December, 1863, Term, it was supposed that the great question of the constitutional power of Congress to issue legal tender paper money would be decided, for a case involving the validity of the Legal Tender Acts was before the Court, on a writ of error to the New York State Supreme Court, *Roosevelt* v. *Meyer*, 1 Wall. 512. By curious mischance, the question was not decided, owing to the fact that the Court held that it had no jurisdiction of the case (although nine years later, it was obliged to admit that its decision had been wrong, and to overrule it). Had the case been decided in 1863, instead of in 1870, it is probable that the Legal Tender Acts would have been held invalid by so large a majority of the Court that no attempt would have been made to reverse the decision, and the Court would have been spared the charges and the temporary discredit, later brought upon it by the rendering of its two contradictory decisions, in 1870 and 1871. The effect of an adverse decision in 1863 upon the methods

[1] *Taney*, 432; *Opinion of the Judges* of Feb. 16, 1863, in 158 U. S. App.

then employed to finance the war presents an interesting field for surmise.

One other case of historical importance with relation to the war may be noted, *Ex parte Vallandigham*, 1 Wall. 243, in which it had been expected that the whole question of the validity of the arrests and military trials ordered by Lincoln and Stanton would be presented for the decision of the Court. The possibility, however, of a conflict between the Court and the Executive on this serious point was averted by a ruling that the Court had no jurisdiction of a petition of habeas corpus issued to a military commission; consequently no decision of the question was made until after the end of the war, in *Ex parte Milligan*, in 1866.

Before the opening of the December Term of 1864, Chief Justice Taney (who had been ill during the whole of the previous Term) died on October 12, 1864. He was then in his eighty-eighth year, and had presided over the Court for more than twenty-eight years. When the Court met on December 7, 1864, resolutions of the Bar were presented by Thomas Ewing, stating that "deeply impressed by the great and good qualities and acquirements and illustrious life" of Taney, they deplored "the decree, inevitable at his advanced age, which had removed him from his place of usefulness, dignity and honor here." [1] In his reply to these resolutions, Judge Wayne, after alluding to the Chief Justice and referring to the body of law built up by his decisions and by those of his predecessor, closed with a patriotic comment upon the war and the duty of the Court in maintaining this great constitutional system

[1] The meeting of the Bar had been held, Dec. 6, 1864, and addresses were made by Thomas Ewing, J. M. Carlisle, Henry Stanbery, Reverdy Johnson and Charles O'Conor. The *National Republican*, Dec. 7, 1864, stated that the resolutions were "read by James M. Carlisle who framed them. Justice Wayne in a low and tremulous voice which was semi-audible replied in behalf of the Court."

of law: "It is truly a system upon which we can rely, as a foundation for securing the rights and independence of the States of this Union and our National Liberty. Gentlemen of the Bar, it is our part to maintain it, and if this shall be done with discretion, and with a spirit exempt from the corruptions of party, our country will again be what it was."

The persistence of the bitterness of partisan feeling which had been aroused by Taney's fatal decision in the *Dred Scott Case* was shown by an entry in the diary of Gideon Welles, the Secretary of the Navy, with reference to a discussion in the Cabinet as to its attendance at Taney's funeral: [1]

> I felt little inclined to participate. I have never called upon him living, and while his position and office were to be respected, I had no honors for the deceased beyond those that were public. That he had many good qualities and possessed ability, I do not doubt; that he rendered service in Jackson's Administration is true, and during most of his political life, he was upright and just. But the course pursued in the *Dred Scott Case* and all the attending circumstances forfeited respect for him as a man or Judge . . . for I have looked on him and his Court as having contributed, unintentionally, perhaps, but largely, to the calamities of our afflicted country. They probably did not mean treason, but thought their wisdom and official position would give national sanction to a great wrong.

Many Republican newspapers commented on Taney's death with extreme rancor. The *Independent*, while stating that "a long life of public service in posts of great power and dignity is just ended", and while admitting his "unblemished private life", could not refrain from making the occasion an excuse for a further attack on the "infamous decision" and his "perdurable ignominy", and it repeated the false charge that Taney

[1] *The Diary of Gideon Welles* (1911), Oct. 14, Nov. 26, 1864.

had stated that the negro had no rights which a white man was bound to respect. "This sentence," it said, "will keep the memory of Chief Justice Taney in the popular mind, as long as the memory of slavery endures. It compresses into a single line the whole bloody history and lawless law of slavery. . . . History will expose him to eternal scorn in the pillory she has set up for infamous Judges."[1] The *Cincinnati Gazette* delivered a violent invective on the Dred Scott decision, which it termed "astounding to lawyers and revolting to every humane man"; and it stated that as the Court became successively more "degraded", the Democratic Party "began to set up its decision as a finality. They dragged it into the party arena to decide political questions," in all of which Judge Taney was "as subservient an instrument as in the tyrannical act for which he was rewarded by his place on the Bench." Other papers even questioned Taney's patriotism. Thus, the Washington correspondent of the *Philadelphia Press* wrote that Taney had earned great and just renown, and had been accepted as the best embodiment of a pure and conscientious Justice, until "that fatal decree which in great part has been the source of all our woes. . . . The Supreme Court from that time became a political, if not a party, tribunal, and the awe and veneration that had so long surrounded its Chief were supplanted by suspicion and distrust. . . . Nobody doubts that Taney died with his heart beating for the Rebellion. He scarcely took pains to conceal his feelings. Some of his decisions in

[1] *Independent*, Oct. 20, 1864; *Cincinnati Gazette*, Oct. 14, 20, 1864; *Philadelphia Press*, Oct. 14, 1864; *Philadelphia North American*, Oct. 14, 1864. The *Nation*, April 23, 1885, stated that the story used to be told of Benjamin F. Wade, the radical Republican Senator from Ohio, "that old Ben said he had for many weary years earnestly prayed that the author of the Dred Scott decision might live until a Republican President could name his successor — and he began to fear that he prayed too hard."

the early days of that most murderous revolt were held to be almost partisan. Hence, however we may remember and respect his past excellence, no true friend of the Government can feel that his loss is a National loss." And the *Philadelphia North American* made an equally unwarranted assault, stating that subserviency and partisanship were characteristic of his nature, proofs of which he had afforded "by his efforts to relieve Maryland traitors from arrest. . . . The Nation can feel little regret at his removal from an office which, in his hands, has been so promiscuously used. It is fortunate for the interests of humanity that the President and Senate who must fill the vacancy are devoted to the interests of republican liberty and will suffer no man of that school of politics to which Taney belonged to intrude into the judicial robes of which death has deprived him."

There were, however, many strong Republican papers which were not blinded by passions arising out of the slavery question, and which frankly admitted the greatness of the dead Chief Justice.[1] "He discharged the high duties of his position with a dignity, impartiality, and integrity which have reflected honor on his country, and in a manner which, with one notable exception, have been entirely satisfactory to his countrymen," said the *Washington Chronicle;* and the *New York Tribune*, while terming him "a votary and pillar of the Slave Power", said that though not so wise a man as Marshall, he was still an "able, learned, upright Judge, whose one signal aberration from the line of duty his surviving countrymen will now hasten to forget", and that "it is no more just than generous to question his integrity, nor his sincerity, whatever we may think

[1] *Washington Chronicle*, Oct. 13, 1864; *Missouri Democrat*, Oct. 18, 1864; *New York Tribune*, Oct. 14, 15, 1864; *New York Times*, Oct. 14, 1864; *Ohio State Journal*, Oct. 17, 1864; *Boston Daily Advertiser*, Oct. 14, 1864.

of the quality of his patriotism. . . . It were unjust to presume that he did not truly and earnestly seek the good of his country." The *New York Times* spoke of Taney's "pure, moral character and great legal learning and acumen", and said: "Had it not been for his unfortunate Dred Scott decision, all would admit that he had, through all these years, nobly sustained his high office. That decision itself, wrong as it was, did not spring from a corrupt or malignant heart. It came, we have charity to believe, from a sincere desire to compose, rather than exacerbate, sectional discord. But yet it was none the less an act of supreme folly, and its shadow will ever rest on his renown." And the *Boston Advertiser* said that, until the Dred Scott decision, Taney "by his acquirements as a jurist and his grave deportment seemed the worthy successor of Marshall; . . . and as the political excitements of the day disappear, and his character as a Judge comes to be read in the long course of his judgments, rather than in political discussion, we may well believe that his name will again shine brilliantly and permanently among those of the greatest of American lawyers and jurists." [1]

That the Democratic papers would eulogize the Chief Justice was to have been expected; and the *World* said that Taney possessed one indispensable qualification for his position which even his assailants admitted, "a high and intrepid independence — that moral fearlessness which is deterred by no obloquy from

[1] That even with Republicans the feelings aroused by Taney's Dred Scott decision had begun to die down prior to his death is seen from an editorial in *Harper's Weekly*, Dec. 8, 1860, which stated: "Taney has won high fame. His opinions command general respect. . . . Within the past year or two, he has, after twenty years absolution from the strife of politics, been subjected to some animadversion by members of the Republican party, in consequence of the Dred Scott decision. Without entering upon the controversy involved in this celebrated case, we may close this brief sketch with the remark that when Judge Taney shall have disappeared altogether from public life, members of all parties will unite to commend his vast learning, his unspotted integrity and his remarkable suavity."

stern obedience to honest convictions." The *National Intelligencer* said that he left "a reputation as much distinguished by the superior dignity of his character as by the extraordinary vigor of intellect"; and the *Baltimore Sun* said that the "common opinion of his countrymen bears witness to his faithful performance of the great duties of his station. . . . He will go to his grave, followed by the reverence and regret of the wise, the thoughtful and the virtuous of his generation." [1]

The persistence of the implacable hatred entertained by the radical anti-slavery Republicans towards the Chief Justice was illustrated, four months after his death, by a debate in February, 1865, on a bill which had been introduced by Lyman Trumbull, the prominent Republican Senator from Illinois, for the placing of a marble bust of Taney in the Supreme Court-room (where already busts of Jay, Ellsworth and Marshall had been installed).[2] "I object," said Charles Sumner, "that an emancipated country should make a bust to the author of the Dred Scott decision." To this, Trumbull replied: "A person who has presided over the Supreme Court for more than a quarter of a century and has added reputation to the character of the Judiciary of the United States throughout the world is not to be hooted down, by an exclamation that the country is to be emancipated. Suppose he did make a wrong decision. No man is infallible. He was a great and learned and able man." [3] "The name of Taney," retorted Sumner, "is to be hooted down the page of

[1] *New York World*, Oct. 14, 1864; *National Intelligencer*, Oct. 13, 1864; see also Nov. 10, 1864, quoting address of William L. Pryor before the United States Circuit Court in New York, and the response of Judge Nelson; *Baltimore Sun*, Oct. 14, 1864.

[2] *38th Cong., 2d Sess.*, Feb. 23, 1865, 1012 *et seq.*

[3] See editorial in *Springfield Republican*, Jan. 26, 1867, entitled "The Just are Generous", with reference to efforts made in Illinois to defeat Trumbull for reëlection because of his vote on the Taney bust question.

history. . . . The Senator says that he for twenty-five years administered justice. He administered justice, at last, wickedly, and degraded the Judiciary of the country and degraded the age." This extreme attack brought to his defense the warm personal friend of the late Chief Justice, Reverdy Johnson, Senator from Maryland, who said: "I cannot fail to express my astonishment at the course of the honorable Senator from Massachusetts, which he thinks it, I suppose, his duty to pursue. If the times in which we are living are honestly and truly recorded by the historian, I think the honorable member from Massachusetts will be very happy, if he stands as pure and high upon the historic page as the learned Judge who is now no more. . . . The decisions of that learned jurist are now quoted with approbation everywhere; and there is not a Judge upon the Bench now (three or four of them having been selected by the present incumbent of the Presidential office) who will not say at once that a brighter intellect never adorned the judicial chair."[1] Trumbull also defended the dead man's name: "I will not undertake to institute a comparison between Marshall and Taney. They were great men, both of them great jurists, and each of them has shed luster upon the judicial tribunal over which he presided. Each was a man of great ability, of great learning, of great purity of character; and I am sorry that the Senator from Massachusetts should come in with this denunciation of a man, against whom he can find no fault except that

[1] In a debate over the Territory of Montana bill, March 31, 1864, Johnson had replied to Sumner's criticism of the Dred Scott decision, in these caustic words: "I have yet to be advised that the honorable member, either by nature or education, has attained so much intellectual celebrity, or possesses such transcendent mental ability as to be able to pronounce *ex cathedra* against a decision pronounced by the Supreme Court of the United States. There are many men, the equals of the honorable Senator, to say the least, intellectually, who think that that decision was anything but an outrage."

he made an erroneous decision"; and he added with sarcasm: "If the Senator from Massachusetts had presided, or should ever preside, over the Supreme Court of the United States for thirty years, he would be more than man, if he did not make any erroneous decision." Sumner returned to the charge with even more extravagant language, saying that Taney should be "left to the sympathetic companionship of Jeffreys . . . the tool of unjust power. . . . What is the office of Chief Justice, if it has been used to betray Human Rights? The crime is great, according to the position of the criminal. If you were asked to mention the incident of our history previous to the Rebellion which was in all respects most worthy of condemnation, most calculated to cause the blush of shame, and most deadly in its consequences I do not doubt that you would say the Dred Scott decision and especially the wicked opinion of the Chief Justice. . . . Judicial baseness reached its lowest point on that occasion. You have not forgotten that terrible decision where a most unrighteous judgment was sustained by a falsification of history." Senator Henry Wilson of Massachusetts said that the Dred Scott decision was "the greatest crime in the judicial annals of the Republic", and that Taney was "recreant to liberty and humanity. . . . It is not in the power of the Congress of the United States to affect his reputation with the present or with the coming ages. Laudations, statues and busts will be as impotent as were the eulogies pronounced by a few conservative gentlemen in the Supreme Court-room a few weeks ago." [1] The debate was closed by Sumner — "Taney shall not be represented as a saint by any

[1] The *Atlantic Monthly* in February, 1865, said that Taney "will most likely, after the traitor leaders, be held in infamous remembrance" and that he covered "the most glorious pages of his country's history with infamy, and insulted the virtue and intelligence of the civilized world."

vote of Congress, if I can help it." The bill was lost at this session of Congress. Later, however, on January 29, 1874, about a month before Sumner's death, a bill for the busts of Chase and Taney was passed without debate, and they were duly placed in the Court-room.

History has recorded a very different verdict upon his place in the annals of the legal history of the country from that which Sumner and Wilson endeavored to establish. "Before the first term of my service in the Court had passed, I more than liked him; I loved him," said Judge Miller, later. "And after all that has been said of that great good man, I always stand ready to say that conscience was his guide, and sense of duty his principle." "Few Judges have had wider experience, and none, perhaps, more capable of forming a sound and unimpassioned judgment," said Judge Dillon. George Ticknor Curtis, one of the counsel who had argued before Taney in behalf of Dred Scott, writing only fourteen years after Taney's death, paid the following handsome and judicious tribute to his qualities: "He was indeed a great magistrate, and a man of singular purity of life and character. That there should have been one mistake in a judicial career so long, so exalted, and so useful, is only proof of the imperfection of our natures. . . . If he had never done anything else that was high, heroic and important, his noble vindication of the writ of habeas corpus and of the dignity and authority of his office against a rash minister of state, who, in the pride of a fancied Executive power, came near to the commission of a great crime, will command the admiration and gratitude of every lover of constitutional liberty, so long as our institutions shall endure." [1] And a sane and temperate review

[1] *Samuel Freeman Miller*, by Charles N. Gregory, *Yale Law Journ.* (1908), XVII; *A Great Judicial Character — Roger Brooke Taney*, by Charles N. Gregory, *ibid.*

of Taney's life in a leading law journal, written only eight years after his death, thus portrayed his position in legal annals. "He presided over the Supreme Court of the United States for upwards of twenty-eight years. To borrow the suggestive words of Cushing: 'He had inducted into office nine Presidents of the United States; and as he stood on that historic eastern front of the Capitol, the Republic's giant steps, in the lofty dignity of his great form and office, year after year witnessing and assisting at the rise and fall of parties, of Administrations, of dynasties, all else seemed to be transitory as day and night, evanescent as dream-spectres, whilst he and it were stable and monumental alone in this government.' His professional career was nearly contemporaneous with the judicial career of Chief Justice Marshall. Together they filled that high office for more than sixty-three years, and may be said to have built up the great structure of Federal jurisprudence, of which the foundation only was laid by their predecessors. . . . Upon all points of new practice, he almost uniformly, even when very infirm and unable to write other opinions, delivered the judgment of the Court. The stability, uniformity, and completeness of our National jurisprudence is largely to be attributed to the fact that, for sixty-three years, only two persons presided over the Supreme Court and that, when its business accumulated and the docket became crowded, Chief Justice Taney possessed that organizing genius which rendered the practice complete and systematic. His judicial Associates speak with profound respect of his value in the consultation-room; and it is the concurrent voice of all whose professional avocations brought them into personal relations with him

(1908), XVIII; *Laws and Jurisprudence of England and America* (1895), by John F. Dillon, 167; *Curtis*, I, 239–246; *Amer. Law Rev.* (1873), VII, 327–328.

that there was a sweetness and benignity, a courtesy of the heart as well as of the manner, and a simple kindliness, especially to the younger members of his profession, which rendered him a conspicuous example for all Judges to imitate. The patient and untiring attention which he always gave to counsel while addressing the Court is worthy of perpetual remembrance. . . . Whatever opinion posterity may form of the greatness of the Judge, there can be but one as to the purity of his heart and his earnest fidelity to his own understanding of his duty. He was twice the object of general denunciation by large multitudes of his countrymen. . . . It is doubtless too soon to expect cool and fair judgment upon one who on such different occasions, so conspicuously opposed popular sentiment. It is an unhappy American custom to charge treason and baseness upon those who differ from us on great questions of policy and law. . . . The calmer judgment of posterity may, perchance, say that, as an abstract question of constitutional law, the Chief Justice rightly interpreted the law as it was, and that the dissenting voices only proclaimed what it should have been. Revolution has confirmed their dissent, and, if amendment was needed, the sword has amended the construction now."

As soon as the death of Taney was announced, agitation as to his successor became active, and the probability of a Republican Chief Justice was hailed with delight by the supporters of the Union. "So old Taney is dead," wrote Col. Charles Francis Adams. "These fatal Ides of November bid fair to see the Executive, Legislative, Judiciary and Army of this country working in one harmonious whole like the strands of a cable. It is a pleasant vision. I at least feel confident it will be realized. However that election may result, one

thing is settled: the darling wish of Taney's last day is doomed not to be realized. It was not reserved for him to put the veto of the law on the Proclamation of Emancipation. I suppose Chase will succeed him, and I do not know that we have any better man. If he does, he will have a great future before him in the moulding of our new constitutional law." Charles Sumner had already written to Lincoln, urging the importance of having the war measures sustained by the Court, and saying that "from this time forward the Constitution must be interpreted for liberty, as it has thus far for slavery." [1] "There is an opportunity now to restore to the office the high character given it by Jay and Marshall, and to lay a cornerstone of regenerated and reconstructed Union," said a prominent Republican organ; and another expressed the hope that the appointment would be made, not in payment of any personal or political debt, but as "the crowning grace of a career of exalted and beneficent public service"; for, it said, "notoriously the Bench of the Supreme Court is not so strong as it was forty years ago, and emphatically it needs to be reënforced and elevated in the opinion of the Nation." The press, in general, assumed that Lincoln would appoint Salmon Portland Chase of Ohio, who had resigned as Secretary of the Treasury, in the preceding June. "The country expects the President to fulfil the wishes of the people by the appointment of Chase," said the *Independent*.[2] Chase had, moreover, very strong supporters in his

[1] *A Cycle of Adams Letters* (1920), letter of Oct. 15, 1864; *Sumner*, IV, letter to Francis Lieber, Oct. 12, 1864; the *Detroit Free Press*, Oct. 17, 1864, said that Taney's death has been "looked for with anxiety by the malignant partisans of Mr. Lincoln. One of their schemes has been to abolitionize the Supreme Court."

[2] *Cincinnati Gazette*, Oct. 20, 1864; *New York Tribune*, Oct. 18, 1864; *Independent*, Oct. 30, 1864; the *New York Herald*, on the other hand, said, Oct. 16, 1864, that: "A worse selection could not be made. The position requires a lawyer of profound attainments. Chase is but a dabbler in legal lore. It requires a man of calm judgment and unbiased opinion. Chase is a partisan!"

Cabinet colleague, Edwin M. Stanton, and in the three prominent Senators, Wilson and Sumner of Massachusetts and William P. Fessenden of Maine. The President, notwithstanding his many differences of opinions with his "imperious Secretary", had always preserved a high and unshaken opinion of his great ability. Long before Taney's death, he had said: "Chase is about one and a half times bigger than any other man I ever knew", and had stated that: "There is not one man in the Union who would make as good a Chief Justice as Chase; and, if I have the opportunity, I will make him Chief Justice of the United States." [1] But Lincoln was uneasy lest Chase's well-known ambition for the Presidency should lead him to mingle politics with law, if he were placed upon the Bench. To Senator Wilson, who had remarked to him that he could afford to overlook Chase's harsh words, Lincoln had replied: "Oh, as to that, I care nothing. . . . I have only one doubt about his appointment. He is a man of unbounded ambition and has been working all his life to become President. That he can never be; and I fear that if I make him Chief Justice, he will simply become more restless and uneasy, and neglect the place, in his strife and intrigue to make himself President. If I were sure that he would go on the Bench and give up his aspirations and do nothing but make himself a great Judge, I would not hesitate a moment." [2] And to George S. Boutwell, Lincoln said: "There are three reasons in favor of his appointment, and one very strong reason

[1] *Salmon Portland Chase* (1899), by Albert Bushnell Hart; *Abraham Lincoln* (1890), by John C. Nicolay and John Hay, IX.

[2] *Abraham Lincoln* (1890), by John C. Nicolay and John Hay, IX; *Reminiscences of Sixty Years in Public Affairs* (1902), by George S. Boutwell, II, 29. In an editorial in the *Independent*, May 15, 1873, on Chase's death, it is said that: "Mr. Lincoln hesitated to appoint him, only because as he said, he (Chase) had the Presidential maggot in his brain, and he (Lincoln) never knew anybody who once had it to get rid of it."

against it. First, he occupies the largest place in the public mind in connection with the office; then we wish for a Chief Justice who will sustain what has been done in regard to emancipation and the legal tenders. We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it. Therefore, we must take a man whose opinions are known. But there is one very strong reason against his appointment. He is a candidate for the Presidency and if he does not give up that idea, it will be very bad for him and very bad for me." Some of his opponents urged that Chase was too old; but as he was only fifty-six, while at the time of their respective appointments, Taney had been fifty-nine, Rutledge fifty-five and Ellsworth fifty, there was little force in this criticism. Other rival candidates of legal eminence had strong advocates. Judge Swayne, then on the Court, was extremely desirous of promotion, and was vigorously urged by Lincoln's personal friend Judge David Davis, and by the Postmaster-General, Dennison. Montgomery Blair, the former Postmaster-General, was also an ardent candidate, and was supported by the Secretary of State, William H. Seward, and by the Secretary of the Navy, Gideon Welles.[1] Chase himself believed that Edwin M. Stanton would be appointed. There was a suggestion of the promotion of Judge Wayne, and Judge William Strong of Pennsylvania was considered.[2] The New York and Massachusetts Bars were supporting

[1] Charles Sumner wrote, Aug. 8, 1865: "Montgomery Blair complained to Seward that he had not pushed him for the Chief Justiceship against Chase. Seward said that he had 'presented his papers' and that Blair was 'his candidate.' Blair thought that if Seward had been much in earnest, he could have prevented Chase's nomination." *Sumner*, IV.

[2] The *National Intelligencer*, Dec. 6, 1864, quoted a Kentucky paper as saying that the appointment of Wayne would be "a suitable acknowledgment of his pure patriotism in a crisis so trying to his allegiance to the Constitution and Union which so many other distinguished Southern men have proved unfaithful to." *Amer. Law Rev.* (1881), XV, 130.

William M. Evarts of New York, and Chase, himself, acknowledged Evart's qualifications, writing characteristically: "Evarts is a man of sterling abilities and excellent learning, and a much greater lawyer than I ever pretended to be. The truth is, I always thought myself much overestimated. And yet, I think I have more judgment than Evarts, and that, tried by the Marshall standard should make a better Judge, while he might, tried by the Story standard." Chase himself had long been anxious to obtain the appointment, but he was unwilling to become an active applicant; and he wrote to his warmest and most effective supporter, Charles Sumner of Massachusetts: "I have feared that the President might suppose that I have some agency in the representations which reach him favorable to my appointment. If he has, I hope you will disadvise him of the impression. I would not have the office on the terms of being obliged to ask for it." Many leading Republicans, however, opposed Chase, and delegations appeared even from Ohio in protest against him, arguing that he had ardent political ambition and that he would use the Bench merely as a stepping-stone to the Presidency, and that he was not of judicial temper.[1]

While the President postponed acting upon the appointment until a month after the close of the Presidential campaign in November, the importance of the choice to be made, and "the duty of filling the Supreme Bench with a man who shall revive Marshall" was pointed out to him in frequent articles in the press. The *Independent* said: "That Court will be called upon,

[1] The *New York World* and *New York Herald* opposed Chase; while the *New York Tribune* and *Independent* warmly favored him. The *Independent*, Dec. 15, 1868, said that Thurlow Weed and James Gordon Bennett came to Washington to consult with Montgomery Blair (Chase's bitterest foe) to see if the nomination could not be prevented.

before long, to deal with the most momentous questions it can ever handle — questions involving the dearest rights of millions of human beings, the sacred honor of the Government, and the entire future of the Republic. If the next Chief Justice of the United States should have either a wrong head or a wrong heart — if he could be another Taney — who could measure the far-reaching extent of such a National calamity? There is one man whose appointment will fulfill the general expectation — Chase. Will the President hesitate about his duty? We believe not." [1] Writing November 26, 1864, Gideon Welles described the situation in an interesting manner, though in his estimate of Chase, allowance must be made for Welles' strong personal prejudices: [2]

The question of Chief Justice has excited much remark and caused quite a movement with many. Mr. Chase is expecting it, and he has many strong friends who are urging him. But I have not much idea that the President will appoint him, nor is it advisable he should. I had called on the President on the 23rd and had some conversation, after dispatching a little business, in regard to this appointment of Chief Justice. He said there was a great pressure and a good many talked of, but that he was now preparing his message and did not intend to take up the subject of Judge before the session commenced. "There is," said he, "a tremendous pressure just now for Evarts of New York, who, I suppose, is a good lawyer?" This he put inquiringly. I stated that he stood among the foremost at the New York Bar; perhaps no one was more prominent as a lawyer. "But that," I remarked, "is not all. Our Chief Justice must have a judicial mind, be upright, of strict integrity, not too pliant; should be a statesman and a politician." By politician I did not mean a partisan. (I said) that it appeared to me the occasion should be improved to place at the head of the Court a man, not a partisan, but one who was impressed

[1] *Independent*, Nov. 24, 1864. [2] *Welles*, II, 181–184, 187.

with the principles and doctrines which had brought this Administration into power, that it would conduce to the public welfare and his own comfort to have harmony between himself and the judicial department, and that it was all-important that he should have a Judge who would be a correct and faithful expositor of the principles of his Administration and policy after his Administration shall have closed. I stated that among the candidates who had been named, Mr. Montgomery Blair, it appeared to me, best conformed to those requirements; that the President knew the man, his ability, his truthfulness, honesty and courage.

Welles also wrote that Postmaster-General Dennison had said that Chase and Lincoln "could not assimilate, and that, were Chase in that position — a life tenure — he would exhibit his resentment against the President, who, he thinks, has prevented his upward official career. . . . He never forgets or forgives those who have once thwarted him." A few days later, Welles wrote that: "Gov. Morgan thinks Chase will be appointed Chief Justice, but I do not yet arrive at that conclusion. The President sometimes does strange things, but this would be a singular mistake, in my opinion, for one who is so shrewd and honest — an appointment that he would soon regret."

Finally, Lincoln made his decision; and magnanimously overlooking all personal considerations he elevated Chase to the Chief Justiceship, on December 6, 1864. "It took Congress, as it did the country, somewhat by surprise," wrote a Washington correspondent, "because the President had so conducted himself within a fortnight as to create the impression that he would not decide the matter at once. Mr. Lincoln is a humorous man, and he seems to have enjoyed the pleasant surprise of Mr. Chase's friends and the confusion of his enemies. He kept his secret

well, if it is a fact, as some of his friends claim, that he has never thought of appointing any one else. . . . A day or two before the nomination was made out, Mr. Lincoln said to a very intimate friend: 'Mr. Chase's enemies have been appealing to the lowest and meanest of my feelings. They report ill-natured remarks of his upon me and my Administration. If it were true that he made them, I could not be so base as to allow the fact to influence me in the selection of a man for the Chief Justiceship.' " No better illustration of Lincoln's high-mindedness and nobility of soul can be found than in this nomination; for as Welles wrote: "The President told Chandler, of New Hampshire, who remonstrated against such selection, that he would rather have swallowed his buckhorn chair than to have nominated Chase." That Lincoln evidently did not consult his Cabinet as to this important appointment is seen from another entry in Welles' diary, on December 6:[1]

Shortly after leaving the Cabinet, I heard that Chase had been nominated to, and confirmed by, the Senate as Chief Justice. Not a word was interchanged in the Cabinet respecting it. . . . I hope the selection may prove a good one. I would not have advised it, because I have apprehensions on that subject. Chase has mental power and resources, but he is politically ambitious and restless, prone to, but not very skillful in, intrigues and subtle management. If he applies himself strictly and faithfully to his duties, he may succeed on the Bench, although his mind, I fear, is not so much judicial as ministerial. He will be likely to use the place for political advancement, and thereby endanger confidence in the Court. He, though selfish, stubborn sometimes, wants moral courage and frankness, is fond of adula-

[1] *Welles*, II, 195–197, *Independent*, Dec. 15, 1864. A letter to the *Cincinnati Gazette* said, Dec. 6, 1864, that the appointment of Chase was written out by Lincoln in his own hand; that the first persons informed were Senator Sherman, and Hugh McCulloch; and that it was not known to any one else, even to the President's Secretary, until it was sent in to the Senate.

tion, and with official superiors is a sycophant. I hope the President may have no occasion to regret his selection.

The appointment was received with very varied feelings by the public. On December 15, Welles wrote: "Chase's appointment gives satisfaction to Sumner and a few others; but there is general disappointment. Public sentiment had settled down under the conviction that he could not have the position. Sumner helped to secure it for him. . . . Sumner declares to me that Chase will retire from the field of politics and not be a candidate for the Presidency. I questioned it, but Sumner said with emphasis it was so. He had assured the President that Chase would retire from party politics. I have no doubt Sumner believes it. What foundations he has for the belief, I know not, though he speaks positively and as if he had assurance. My own convictions are that, if he lives, Chase will be a candidate and his restless and ambitious mind is already at work. It is his nature." By the press of the country, in general, the appointment met with approbation.[1] "The eminent qualifications which Mr. Chase brings to this exalted position will be recognized by all citizens without distinction of party, among whom purity of character in combination with distinguished intellectual endowments are held in honor," said the *National Intelligencer*. Even the Democratic *New York World* said that the appointment "will be generally endorsed by the public opinion of the country as the most suitable that could have been made." The *Boston Advertiser* commented with

[1] *Washington Star*, Dec. 7, 1864: "The nomination will strike the country generally as one eminently fit to be made." *Philadelphia Press*, Dec. 8, 1864; *Boston Daily Advertiser*, Dec. 8, 1864; *New York World*, Dec. 7, 1864. The *New York Evening Post*, Dec. 6, 1864, termed him "calm, deliberate, just . . . long intimately acquainted with the whole class of subjects which are likely to engage in the coming time the attention of the Court."

much fairness as follows: "Enemy as well as friend has admitted his dignity and force of character, his intellectual power and grasp, and the immoveable strength of his convictions of right. . . . It was urged by many, and with some force, while this appointment was still in doubt, that in filling such a place, the President's choice should properly fall upon some man of legal eminence, rather than anybody whose name had long been connected with politics, and that by such a course, Mr. Lincoln might do something towards raising the Supreme Judicial tribunal of the Nation above the embittered discussion of the past few years, and give it something like its former hold upon the confidence of men of all parties. Mr. Lincoln, however, in making this appointment from political life rather than with reference to professional distinction alone, has followed a long line of precedents on both sides of the water. . . . Jay, Ellsworth, Marshall and Taney . . . were all men whose political career had given them a position and rank which mere preëminence at the Bar seldom brings. Mr. Lincoln, like former Presidents, preferred to call to that station a statesman who has already secured the attention and respect, if not the friendship, of the whole country, trusting, as they did with such eminent success, that the judicial capacity and high merit of the man would, in the sequel, secure besides these advantages, the confidence of all classes and parties."

There were some who, as stated in the foregoing editorial, were apprehensive of the appointment as savoring too much of politics, and who feared that Chase's absence from the Bar since 1850 and his service in the Senate and in the Cabinet had withdrawn him from legal pursuits, and had rendered him less able to cope with the modern developments of the law.

Some also believed that he would find it difficult to disassociate his opinions from political considerations, in view of the fact that many questions on which he must now pass had been before him when in Executive office. "I dined with him," wrote Hugh McCulloch, "a couple of weeks after the coveted honor had been conferred upon him, and I was pained by discovering that he was far from being satisfied. . . . High as the position was, it was not the one to which he had really aspired. To him it seemed like retirement from public life." [1]

Few of the forebodings of his opponents were justified, and the prediction that politics would influence his decisions proved especially false. For though with this appointment, President Lincoln had practically reconstituted the Supreme Court as it existed prior to the war (five of the members being his appointees — Swayne, Miller, Davis, Field and Chase, — and these five becoming a majority of the Court on the death of Judge Catron, six months later), nevertheless, those politicians who hoped for a partisan administration of justice by the Court with its new Judges were disappointed. Again it was shown to the American people that even in time of stress, the men who ascended the Supreme Bench, dropped their "politics when they assumed the black robes." And again it was found, as has been well said by Chase's biographer, that, precisely as the Republican appointees of Jefferson and Madison had failed to conform to the Presidential hopes that they would modify the Federalism of the

[1] *Men and Measures of Half a Century* (1888), by Hugh McCulloch, 186–187; John Sherman in his *Recollections of Forty Years* (1895), II, 340, states that in September, 1864, Chase was his guest for a day or two; "He was evidently restless and uneasy as to his future. I spoke to him about the position of Chief Justice. . . . He said it was a position of eminence that ought to satisfy the ambitions of anyone but for which few men were fitted."

Court under Washington and Adams, so now, the reconstituted Court, "inherited the spirit of its predecessors; it continued to hold fast to its time-honored principles on public law and private rights, rather than to set up a new régime; and Chase's influence bore for caution and restraint, and not for radical changes." His own view of the necessity of eliminating all political considerations was set forth in a letter during the Johnson impeachment proceedings, when he wrote that he wished his name permanently disconnected from the Presidency: "I must dismiss every thought which might incline the scale of judgment either way. Do what I may, I cannot hope to escape imputations. I only hope to avoid giving any just occasion for them. The rest I leave cheerfully to Him who alone judgeth righteously." [1]

It must be admitted, however, that, in spite of the expression contained in this letter, Chase retained his ambition to succeed to the Presidency, and he was undoubtedly desirous of receiving the nomination both in 1868 and in 1872. While this ambition never influenced his judicial decisions, it seriously impaired the popular confidence in his impartiality and weakened the effect of some of his opinions. There was one further obstacle to his complete eminence in his position, which was referred to by Hugh McCulloch: "He had not been in the active practice of the law for twenty years, nor had he been able during that period to devote any time to legal studies. . . . So that when he went upon the Bench, he was unfamiliar with the work which he was called upon to perform. . . . He did have to work much harder in the investigation of legal questions,

[1] *Private Life and Public Services of Salmon Portland Chase* (1874), by Robert B. Warden, letters of March 2, 10, 1868; *Salmon Portland Chase* (1899), by Albert Bushnell Hart.

and in the preparation of opinions, than any of his Associates." Though he gradually developed great legal capacities as a Judge, Chase's own modest attitude towards his qualifications was strikingly expressed in a letter written three years after his appointment: "I never expected great success in any position I have occupied. My surprise at the degree of it that I have achieved has been greater, perhaps than any other man's. And now I still less hope for much success as a Judge. I came to the Bench too late and from too active pursuits to think of emulating any of my great predecessors. It will suffice if the duties of my position are performed according to the measure of my ability and circumstances."

On Thursday, December 15, 1864, at eleven in the morning, Chief Justice Chase took his seat on the Bench. "The scene was one to be remembered for a lifetime, yet it was of the simplest character," wrote a Washington correspondent. "There was a crowd of spectators present; but next to Mr. Chase, one man, himself a spectator, was the most interesting figure in the group of celebrated persons there. It was Charles Sumner. He stood leaning against one of the composite pillars at the right of the Justices, evidently agitated by the reflections suggested by the scene. It was in that very chamber, and the Senator looked down upon the spot, where Brooks made his murderous assault upon him but a few years ago; and now what a change! An abolitionist, and one glorying in the name, is Chief Justice; while of all the bloody men who participated in the intended murder (either actively or passively) scarcely one is alive; and the two or three who are, have sunk to obscurity. This is the revenge that time brings to the virtuous. When I saw Mr. Chase stand there in the highest place upon that Bench, already

THE SUPREME COURT IN 1865

Left to right: Davis, Swayne, Grier, Wayne, Chief Justice Chase, Nelson, Clifford, Miller, Field.

honoring it by his majestic presence, I was satisfied that Providence had ordered events more wisely than men could have done, in making Abraham Lincoln President, and Salmon P. Chase, Chief Justice."

On February 1, 1865, six weeks after the new Chief Justice took his seat, an event occurred in the Court which must have stirred his soul to its depths, when he reflected on the long years during which he had struggled in behalf of the negro; for on that day, the first negro lawyer — John S. Rock of Massachusetts — was admitted to practice before the bar of the Court. The dramatic event was thus described by an earnest anti-slavery man:[1] "The black man was admitted. Jet black, with hair of an extra twist — let me have the pleasure of saying, by purpose and premeditation, of an aggravating 'kink' — unqualifiedly, obtrusively, defiantly 'Nigger' — with no palliation of complexion, no let-down in lip, no compromise in nose, no abatement whatever in any facial, cranial, osteological particular from the despised standard of humanity brutally set up in our politics and in our Judicatory by the Dred Scott decision — this inky-hued African stood, in the monarchical power of recognized American Manhood and American Citizenship, within the bar of the Court which had solemnly pronounced that black men had no rights which white men were bound to respect; stood there a recognized member of it, professionally the brother of the distinguished counsellors on its long-rolls, in rights their equal, in the standing which rank gives their peer. By Jupiter, the sight was grand! 'Twas dramatic, too. At three minutes before eleven o'clock in the morning, Charles Sumner entered the Court-room, followed by

[1] *Independent*, Dec. 22, 1864, Feb. 9, 1865, quoting *New York Tribune*. Gideon Welles wrote in his diary, Feb. 3, 1865: "A negro lawyer has been presented by him (Sumner) to practice in the Supreme Court and extra demonstrations of that kind have been made by him and Chief Justice Chase."

the negro applicant for admission, and sat down within the Bar. At eleven, the procession of gowned Judges entered the room, with Chief Justice Chase at their head. The spectators and the lawyers in attendance rose respectfully on their coming. The Associate Justices seated themselves nearly at once, as is their courteous custom of waiting upon each other's movements. The Chief Justice, standing to the last, bowed with affable dignity to the Bar, and took his central seat with a great presence. Immediately the Senator from Massachusetts arose, and in composed manner and quiet tone said: 'May it please the Court, I move that John S. Rock, a member of the Supreme Court of the State of Massachusetts, be admitted to practice as a member of this Court.' The grave to bury the Dred Scott decision was in that one sentence dug; and it yawned there, wide open, under the very eyes of some of the Judges who had participated in the judicial crime against Democracy and humanity. The assenting nod of the great head of the Chief Justice tumbled in the corse and filled up the pit, and the black counselor of the Supreme Court got on to it and stamped it down and smoothed the earth to his walk to the rolls of the Court." It is a noteworthy fact that the status of the negro, even at that date, had continued so unsettled, that the new member of the Supreme Court Bar was obliged, after his admission, to go to the Provost Marshal to obtain a permit, before he could return to Massachusetts — no negroes being then allowed to leave Washington without a license from the military authority.

Within a year after Chase's accession, his progress in his judicial office was described in a letter from Washington as follows:[1] "The Chief Justice is hale and

[1] *Independent*, March 29, 1866.

hard at work, busy in downright earnest with his grave duties. Rising early, he attacks his books, examines his briefs, ponders his points of law and often before breakfast has done a fair day's work. Mr. Chase has signally realized his early ambition to attain to the one official position, which I know him to regard as the loftiest in our American system of government. During the few months immediately after his appointment, he found the studious and meditative life of the Judge so great a contrast to the exciting labors of a cabinet minister, that a man of his executive genius could not but feel a temporary irksomeness, as from a loss of customary muscular exercise. His shoulders at first did not feel weight enough in his gown. But he soon brought his faculties into such harmony with his office that he now takes up each new case, with a freshness of spirit that shows how a total change in one's intellectual habits in mature years may prove one of the best methods of keeping an elderly gentleman from growing old."

In view of the tremendous number of cases arising out of the war, during the ten years following the appointment of Chase as Chief Justice, it was of inestimable value to the country to have at the head of the Court not only a great lawyer, but a great statesman who had served both in Congress and in the Cabinet, and who was thoroughly and practically familiar with the business administration and economic and military problems of the Government. As had been predicted on his appointment, Chase brought "to the complicated and embarrassing questions growing out of the war and the subsequent reconciliation of divided sections . . . a large wisdom, a discerning but impartial judgment, and the sincerest patriotism, a love for the whole Nation and for all its parts, and a resolute will that neither an overgrown centralization of power in the

Federal head, nor an anarchical claim of absolute sovereignty in the component States shall vitiate and defeat" the long-established system of American government.[1] With such a man at its head, and in view of the conditions of the times, it was but natural that, for the first six years after his accession to the Bench, the trend of the Court's decisions should be distinctly Nationalistic in character, sustaining the powers of the Government to the fullest extent. The first important task which fell to Chase's lot was the development of the American prize law, in a series of about thirty noted cases. As early as January 30, 1865, in *The Circassian*, 2 Wall. 135,[2] and in the more famous cases of the *Bermuda*, the *Springbok* and the *Peterhoff* in the two succeeding years, the Court established the famous doctrine of "continuous voyage" and "ulterior destination." In the *Bank Tax Cases*, 2 Wall. 200, in 1865, and in a long series of cases later, the Court was required to consider the constitutionality of the great National banking system and the validity of the numerous State statutes which sought to tax the notes and operations of the National banks and the capital of State banks invested in United States Government stock or bonds. In all these cases, the Court consistently held that investments in Government securities could not be taxed by the States, and that shares in the National banks could only be taxed by permission of Congress — such National banks being an agency of the National Government whose operation could not legally be impeded by State action.[3]

[1] *New York Evening Post*, Dec. 8, 1864.

[2] See especially as to this case an editorial in the *New York World*, March 17, 1863.

[3] See also *Bank of Commerce* v. *Commissioner*, 2 Black, 620; *Bank Tax Cases*, 2 Wall. 200; *Van Allen* v. *Assessors*, 3 Wall. 573; *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Institution for Savings* v. *Massachusetts*, 6 Wall. 611; *Bank* v. *The Supervisors*, 7 Wall. 26; *Austin* v. *The Aldermen*, 7 Wall. 694; *National Bank* v. *Commonwealth*, 9 Wall. 353; *Lionberger* v. *Rouse*, 9 Wall. 468.

In 1866, the Court enhanced the National power by an important decision in *The Moses Taylor* and in *The Hine* v. *Trevor*, 4 Wall. 411, 555. In these cases, it was held for the first time that the grant of admiralty jurisdiction to the District Courts by the Judiciary Act of 1789 was exclusive, and that State laws conferring remedies *in rem* could only be enforced in these Courts. The result of the decision was to deprive the State Courts, especially in the West, of an immense class of cases relating to maritime contracts, collisions and other torts, over which they had hitherto exercised jurisdiction.

In 1867, another phase of the development of the principle that a State might not impede or embarrass the Government or impair the rights of the United States' citizens under the Constitution was presented by the decision in *Crandall* v. *Nevada*, 6 Wall. 35, in which a tax imposed by the State of Nevada upon every person leaving the State by railroad or stage coach or vehicle transporting for hire, was held invalid. It was declared that all citizens had a right to pass from State to State and to come to the seat of the Government, and that "this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it." That the Court had not yet fully realized the broad scope of the Commerce Clause of the Constitution was illustrated in this case by the fact that it refused to hold the statute invalid under that Clause; and it stated that "the tax does not itself institute any regulation of commerce of a National character or which has a uniform operation over the whole country." [1]

[1] Four years later, in 1871, in *Ward* v. *Maryland*, 12 Wall. 418, the Court held a State tax discriminating against non-resident traders invalid, as repugnant to the provision of the Constitution guaranteeing State citizens all the privileges and immunities of citizens in the several States; but here again it found it unnecessary to decide whether the tax infringed on the right of Congress to regulate interstate commerce. See also *Woodruff* v. *Parham*, 8 Wall. 123; *Hinson* v. *Lott*, 8 Wall. 148, in 1869; and *United States* v. *Wheeler*, 254 U. S. 281 in 1920.

Other than these decisions on National supremacy, the Court's chief work, in 1867 and the immediately ensuing years, in connection with the war was the settlement of the legal effect of the existence of a state of war upon business conditions. Its effect upon the running of the statute of limitations was considered in *Hanger* v. *Abbott*, 6 Wall. 532, and on contracts and trading with or for the enemy and on debts to an enemy in *Hall* v. *Coppell*, 7 Wall. 542. The important financial and tax legislation of the war was upheld in *Pacific Insurance Company* v. *Soule*, 7 Wall. 433, in which the nature of a "direct tax" under the Constitution was carefully elucidated in connection with the internal revenue laws.[1] The general power of the Government to expropriate property other than enemy property, in time of war and immediate public exigency, and the validity of the statutes which provided for the disposition of captured and abandoned cotton and for its sale and deposit of proceeds in the United States Treasury to meet the claims of any owners who could prove they had not adhered to the cause of the enemy were upheld, in 1871, in the noted case of *United States* v. *Russell*, 13 Wall. 623, and in about twenty cases during the succeeding fifteen years.[2] Another series of about thirty cases (decided over a period of twelve years) involved the statutes enacted for the confiscation and conservation of enemy property, the constitution-

[1] In *Bennett* v. *Hunter*, 9 Wall. 326, there was involved the first instance, since the early years of the Republic, of the imposition by Congress of a direct tax on land apportioned among the States.

[2] Act of March 12, 1863, and Act of July 2, 1864. See *The Constitution and the War Power — War Claims against the United States*, by William Lawrence, *Amer. Law Reg.* (1874–75), N. S. XIII, XIV; *The Rebellion*, by R. McPhail Smith, *Southern Law Rev.* (1873–74), II, III; *The Late Civil War and its Effect on Civil Remedies*, by William A. Maury, *Amer. Law Reg.* (1875), N. S. XIV; *Constitutional Foundation of War Claims for Property*, by William B. King, *Amer. Law Reg.* (1881), N. S. XX; *Some Legal Aspects of the Confiscation Acts of the Civil War*, by James G. Randall, *Amer. Hist. Rev.* (1912), XVII; *Captured and Abandoned Property during the Civil War, ibid.* (1913), XIX.

ality of which were upheld in another notable opinion, in 1871, *Miller* v. *United States*, 11 Wall. 268.[1] The legal status of the Confederate States and of their legislation during the war was settled by the Court, as early as 1870, in *Hickman* v. *Jones*, 9 Wall. 197, in which it held the Confederate Government to be "simply an armed resistance to the rightful authority of the sovereign"; and all its acts were held invalid so far as they were in aid of the rebellion. While the more radical Republican leaders were insistent that all legislation of every kind enacted by the various States of the Confederacy were illegal and void, the Court took a more conservative and rational view; and in *Horn* v. *Lockhart*, 17 Wall. 570, in 1873, it decided that the acts of the several Confederate States "so far as they did not impair or tend to impair the supremacy of the National authority or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society or do away with civil government." [2]

[1] Act of July 13, 1861; Act of August 6, 1861; Act of July 17, 1862; see especially *McVeigh* v. *United States*, 11 Wall. 259, in which the right even of an enemy to be heard in proceedings under the confiscation laws was upheld; and for the facts of this very extraordinary cause, see *New York Herald*, April 23, May 7, 1873.

[2] In *Keith* v. *Clark*, 97 U. S. 454, it held that legislation by a Confederate State not in aid of the rebellion was valid. "The State remained a State of the Union. She never escaped the obligations of that Constitution, though for a while she may have evaded their enforcement." In *Lamar* v. *Micou*, 112 U. S. 452, in 1884, it was held that investment by a guardian in bonds of the Confederate States "was clearly unlawful, and no legislative act or judicial decree or decision of any State could justify it. The so-called Confederate government was in no sense a lawful government but was a mere government of force, having its origin and foundation in rebellion against the United States", and its bonds had no legal value as money or property, except by agreement or acceptance by parties capable of contracting.

CHAPTER TWENTY-NINE

THE MILLIGAN CASE

1866–1867

Although, from 1861 to 1870, the Court had consistently upheld the authority of the National Government, had widened the scope of jurisdiction of the Judiciary of the United States and had strictly limited the sovereignty of the States whenever they appeared to trespass on the National domain, it was destined to become the object of the most serious and determined attack by the very political party which favored such extension of National power.

The death of President Lincoln occurred on April 14, 1865, at the close of the December, 1864, Term; and with that Term, there ended a period of five years during which the Court had been absolutely free from the partisan criticism prevalent during the decade from 1850 to 1860. In 1866, however, political attack was renewed in a most violent form, as the Court became gradually involved in the fierce conflict then ensuing between President Johnson and the Congress over Reconstruction policies. The Republican opponents of the President were determined to abolish the military and civil State Governments in the South, instituted by Johnson under his Executive authority. They were insistent upon the establishment of a purely military control by legislative enactment, until the States should be reorganized and ad-

mitted back into the Union upon acceptance of such conditions as Congress should choose to impose. But, while confident of their power to prevail over the President's antagonism to their measures, the radical Republicans were apprehensive as to the attitude of the Court. Since no one of the forms of Government for the South proposed by them had any express constitutional sanction, and since it was openly stated by the President and his supporters that the validity of any such legislation would be challenged, it was evident that the Court might become the final arbiter of the situation; and in such event, the Radical Republicans were very doubtful as to the views of the Chief Justice. It was reported in the press that he did not approve their course in Congress; and it was well known that President Lincoln himself had expressed some fear lest Chase on the Bench might not support his war policies. "Lincoln hesitated," wrote Hugh McCulloch, "for some days, while the matter was under consideration, to send his name to the Senate, under the apprehension that he might be somewhat rigorous in his judgment of some of the Executive acts, and especially those of the Secretary of War, if suit should be brought involving questions that could only be settled by the Supreme Court. Knowing that my relations with Mr. Chase were intimate, he sent for me one day, and after explaining the nature of his fears, asked me what I thought about them. 'Why, Mr. President,' I replied, 'you have no reason for fears on that score. Mr. Chase is in the same box with yourself and Mr. Stanton. He favored and advised, as he himself has informed me, the dispersion by force of the Maryland Legislature, and if anything more illegal than that would have been has been done, I have not heard of

it.'"[1] Shortly before Lincoln's death, and less than three months after the appointment of the new Chief Justice, it appears that he had received further intimations that Chase's views as to the legality of military trials would be adverse to the Administration, for his Secretary of the Navy, Gideon Welles, wrote in his diary:

Feb. 21, 1865. I found the President and Attorney-General Speed in consultation over an apprehended decision of Chief Justice Chase, whenever he could reach the question of the suspension of the writ of habeas corpus. Some intimation comes through Stanton, that His Honor the Chief Justice intends to make himself felt by the Administration, when he can reach them. I shall not be surprised, for he is ambitious and able. Yet on that subject, he is as much implicated as others.

Feb. 22, 1865. Met Speed at President's a day or two since. He is apprehensive Chase will fail the Administration on the question of habeas corpus and State arrests. The President expresses, and feels, astonishment. Calls up the committals of Chase on those measures. Yet I think an adroit intriguer can, if he chooses, escape these committals. I remember that on one occasion when I was with him, Chase made a fling which he meant should hit Seward on these matters, and as Seward is, he imagines, a rival for high position, the ambition of Chase will not permit the opportunity to pass, when it occurs, of striking his competitor. There is no man with more fierce aspirations than Chase, and the Bench will be used to promote his personal ends. Speed and myself called on Seward on Monday, after the foregoing interview with the President. Seward thinks Chase, if badly disposed, cannot carry the Court, but this is mere random conjecture.

At the time of the trial of the assassins of Lincoln before a military commission sitting in the District

[1] *Springfield Weekly Republican*, April 7, 1866, quoting a Washington correspondent of the *Cincinnati Commercial; Men and Manners of Half a Century* (1888), 186, 187, by Hugh McCulloch; *The Diary of Gideon Welles* (1911), II, 242, 245, 246.

of Columbia, the attitude of some of the other Judges of the Court had disturbed the Radical leaders in Congress, who feared lest the Court should issue writs of habeas corpus and discharge the prisoners. Welles recorded in his diary, July 17, 1865, that Secretary of War Stanton, in his characteristic, arbitrary fashion, wanted the prisoners sent to the Dry Tortugas in the South, "where old Nelson or any other Judge would not try to make difficulty by habeas corpus." The Judges had also drawn upon themselves the criticism of the Radicals, by their refusal to sit in the Circuit Courts in the Southern States, so long as those States were governed by military authority. Though the Federal District Judges in Virginia, Mississippi and Alabama held Court during 1866, Chief Justice Chase and his Associates had declined to sit on Circuit until, as he said, "all possibility of claim that the judicial is subordinate to the military power is removed, by express declaration of the President"; and it was not until June 6, 1867, that he opened in North Carolina the first Circuit Court to be held in the Southern States.[1] The refusal of the Chief Justice to hold Court in Virginia, thereby preventing the trial of Jefferson Davis for treason, gave particular offense to the Radical Republicans.[2]

As a consequence of this distrust both of the Pres-

[1] Under the Judiciary Act of July 29, 1866, the Supreme Court Judges lost their Circuit Court jurisdiction in the Southern States; but this was restored by the Act of March 2, 1867. Cases appealed from Southern States were heard for the first time at the December, 1866, Term of the Supreme Court, there being then twenty-nine pending; see *New York Herald*, Dec. 13, 1866. See Chase's address to the Bar, *Amer. Law Rev.* (1867), I, 745.

[2] One of Davis' counsel, George W. Brown, wrote to Franklin Pierce, Jan. 10, and July 14, 1866: "Whether or not a trial will ever take place is wholly uncertain, dependent on the turn political affairs may take. The Radicals have insisted on a trial, because they thought that something might be gained for their party, very erroneously, I believe. It is a strange and anomalous condition of

ident and of the Court, the first move which Congress made was to reduce the membership of the Court. After the number of Associate Judges had been increased to nine, in 1863, to provide a new Circuit Court for the Districts of California and Oregon, and after appointment of Judge Field, the Court had consisted of six Democrats and four Republicans. On the appointment of Chase in 1864, the Court had become evenly divided in political character; and after Judge Catron had died, May 30, 1865, the Judges appointed by President Lincoln constituted a majority of the Court (Chase, Swayne, Miller, Field and Davis). President Johnson had nominated, on April 16, 1866, to fill the vacancy caused by Catron's death, Henry Stanbery of Ohio, a close personal friend, then Attorney-General of the United States, a Republican and a lawyer of high eminence. "A most excellent appointment, and it is to be hoped that he will be promptly confirmed. His power of legal analysis, close reasoning, accuracy of statement and concise and forcible expression have justly placed him at the head of the present Bar of the Supreme Court," said a prominent Republican paper.[1] The Senate, however, was determined to curb the President in every move; and fearing that he might have the opportunity to make further appointments to the Bench,

things that the Court which has indicted him refuses to bail him, because he is held by the military arm of the Government; and the Chief Justice will not hold Court in Virginia, until martial law is formally revoked. He had no such scruples about holding Court in Maryland, when martial law was carried out with a strong hand. . . . The real difficulty, no doubt, is that Ch. J. Chase does not choose to recognize Virginia as legally in the Union, by going to Richmond and holding Court there." *Franklin Pierce Papers MSS.* See also *Harper's Weekly*, Nov. 25, 1865, quoting Chase as saying that "it was not becoming the Courts of the United States to sit in regions still subordinate to military law." The *Springfield Weekly Republican*, Jan. 13, 20, Feb. 3, 24, April 7, 1866, assailed Chase for his attitude as to Davis, and said he had "White House on the brain. . . . No man has fallen more in public esteem, in public confidence."

[1] *Philadelphia Inquirer*, April 18, 1866.

it passed a bill, moved by Lyman Trumbull of Illinois, providing for the reduction of the number of Associate Judges to seven. To the question asked in the House whether "this bill abolishes the Judge whose appointment the President sent to the Senate the other day", it was stated by Wilson of Iowa that such was its effect as well as purpose.[1] By this Act of July 23, 1866, the Court became nine in number, and by the death of Judge Wayne on July 5, 1867, it was further reduced to eight.

Meanwhile, before the passage of this Act affecting the membership of the Court, that body had seemed to justify the fears of the Republican leaders, by rendering a decision at the very end of the Term, on April 3, 1866, which came as a staggering blow to the plans for the use of the military forces in the process of Reconstruction then being matured by Congress. In *Ex parte Milligan*, 4 Wall. 2, the Court held that the President had no power to institute trial by military tribunal during the war in localities where the civil Courts were open. At first, the country at large did not realize the fateful breadth of the decision, and the press paid little attention to it, since, on this date, the Court confined itself to a mere announce-

[1] *39th Cong., 1st Sess.*, Feb. 26, July 10, 18, 1866. See criticism of this action of Congress in *Democracy in the United States* (1868), by Ransom H. Gillet. The *American Law Review* (1867), I, 206, said: "There seems to have been no serious opposition to the law, which was in no sense a political measure, however much political feelings may have aided its passage. We are constrained, however, to doubt the wisdom of it. Ten Judges is too large a number for any Court; but, when we consider the great extent of the country, the distances which Judges have to travel, the advantage of having every section of the Union represented, if possible, in this tribunal, — it is a matter of serious inquiry, whether the number of Judges can be much reduced, without our incurring greater evils than that of the bulkiness of the Bench. Nor does the Act strike us as opportune, if we allow the abstract wisdom of it. In consequence of the great number of vacancies which have taken place of late years, there are many Judges of brief experience upon the Bench. The older ones have reached an age at which we cannot expect much more service from them; and the result of the recent law may be, that, ere long, the entire South will be without a Judge on this Bench, and the country east of the Allegheny Mountains have but two, who must bear the chief burden of all maritime cases."

ment of its judgment, without setting forth its reasoning. Nevertheless, its full effect was at once apparent to President Johnson and to the Radical Reconstructionists in the Senate; and Welles recorded in his diary:

> April 2, 1866: The President inquired as soon as the subject was taken up whether any facts were yet public in relation to the decision of the Supreme Court in the Indiana cases.
>
> April 6, 1866: The decision of the Supreme Court in the Indiana Cases, — Milligan, Bolles and others — was discussed. Attorney-General Speed could not state exactly the points. The Judges do not give their opinions until next winter. They seem to have decided against the legality of military commissions. I inquired what should be done in Semmes' case, which had been long pending. Little was said, and the President said he would see me after the session, and I therefore remained. He remarked that there was a somewhat strange state of things. . . . The Courts were taking up some of the cases for treason and were showing themselves against military commissions. He therefore thought it would be as well to release Semmes on parole.

On December 17, 1866, at the beginning of the next Term, however, when the Judges delivered their opinions in full, the decision became at once the subject of the most violent and virulent attack, as well as of extravagant praise, by the different factions throughout the country. This *Milligan Case* had arisen in the following manner. A previous attempt had been made, in 1864, to secure an opinion from the Court as to the legality of the military commissions constituted by President Lincoln. Application had been made to the Court for a writ of habeas corpus in the case of the notorious Clement L. Vallandigham, who had been arrested and held for military trial. No

decision, however, had been rendered on the point desired to be tested; for the Court held, in *Ex parte Vallandigham*, 1 Wall. 243, on February 15, 1864, that it had no power to issue such a writ to a military commission, since under the Judiciary Act its appellate jurisdiction extended only to judicial Courts. Within a short time after this decision, however, another case was initiated, in which the Court would be required to face and settle the issue. One Milligan had been arrested on order of the General commanding the military district of Indiana and tried, in October, 1864, by a military commission on a charge of conspiracy against the Government, giving aid and comfort to the rebels, initiating insurrection, disloyal practices, and violating the laws of war. He was found guilty, and was sentenced to be hung on May 19, 1865. On May 10, 1865, he petitioned the United States Circuit Court in Indiana for a writ of habeas corpus; and the Judges disagreeing certified the question of law to the Supreme Court. The case was argued on March 6 to 13, 1866, only two months after the adoption of the Fourteenth Amendment by Congress, and at a time when legislation based on the continuance of military control was still under debate.[1] Impressive, eloquent and impassioned pleas were made by David Dudley Field, General James A. Garfield and Jeremiah S. Black for the prisoner,[2] and by Attorney-

[1] The resolution for this Amendment passed the Senate, Jan. 8, and the House, Jan. 13, 1866; see *History of the Fourteenth Amendment* (1908), by Horace S. Flack. The Civil Rights Act was enacted April 6, 1866, over President Johnson's veto.

[2] See Address of Levi March in *Reminiscences of J. S. Black* (1887), by M. B. Clayton, 131: "Of the arguments the most powerful is that of Jeremiah S. Black, which has been described as 'indisputably the most remarkable forensic effort before that august tribunal, delivering his address without a solitary note of reading from a book, and yet he presented an array of law, fact and argument, with such remarkable force and eloquence as startled and bewildered those who listened to him. . . . Freedom was his client. The great cause of Constitutional Liberty hung upon that single life.'"

General James Speed, Henry Stanbery and Benjamin F. Butler for the Government. On April 3, 1866, within the short space of three weeks after the argument, the Court rendered its decision, unanimously holding the military commission authorized by the President to have been unlawful. A majority of the Court — Judges Field and Davis (appointed by Lincoln) and Nelson, Grier and Clifford (appointed in pre-war days) — took the occasion to state their further opinion that neither the President nor Congress possessed the power to institute such a military commission, except in the actual theater of war, where the civil Courts were not open. There being thus injected into the case a question which did not arise on the facts, four Judges — Chief Justice Chase and Judges Miller, Swayne (appointed by Lincoln) and Wayne (appointed by Jackson) — filed a dissenting opinion refusing to regard the power of Congress as subject to such limitations. The opinion of the Court, holding Lincoln's military tribunal illegal, was delivered by Lincoln's personal friend, Judge Davis. "No graver question was ever considered by this Court, nor one which more nearly concerns the rights of every American citizen when charged with crime, to be tried and punished according to law," he said. "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." Its provisions cannot "be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism. . . . Martial rule can never exist where the Courts are open, and in the proper and unobstructed exercise of their jurisdiction." Hence the military commissions were held

illegal.[1] In a dissenting opinion agreeing with the majority on the actual question involved, but contending that Congress had the power to institute military commissions, the Chief Justice said: "We cannot doubt that, in such a time of public danger, Congress had power, under the Constitution," to make such provisions for military trial; and he stated that the civil Courts "might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish with adequate promptitude and certainty, the guilty conspirators. . . . The power of Congress to authorize trials for crimes against the security and safety of the National forces may be derived from its constitutional authority to raise and support armies and to declare war, if not from its constitutional authority to provide for governing the National forces."

This famous decision has been so long recognized as one of the bulwarks of American liberty that it is difficult to realize now the storm of invective and opprobrium which burst upon the Court at the time when

[1] The subsequent facts as to the petitioner in the *Milligan Case* are of interest. His sentence of hanging on May 19, 1865, was suspended on May 10, pending his petition to the Court; and it was commuted to life imprisonment by President Johnson on June 21, 1865. He was confined in the Ohio Penitentiary by order of Gen. Hovey, the military commander of the District of Indiana, and was released on April 10, 1866, after the decision of the Supreme Court. On March 13, 1868, he brought an action for damages against Gen. Hovey in the State Court, which, under the Removals Act, was removed to the Federal Circuit Court by Hovey. While it was pending there, the *Cincinnati Enquirer*, on May 18, 1871, expressed the editorial hope that Milligan's suit would be upheld: "It would be a healthy, political sign to show that there was a limit to military usurpation; and that even the President of the United States cannot give an order, or enforce a decree, against the law of the land, and that his illegal orders are no protection to his subordinates. This is a lesson that military tyrants and usurpers should be taught, if we would preserve any remnant of liberty in the land." The jury, after a charge from Judge Thomas Drummond, rendered a verdict in Milligan's favor, but awarded him only nominal damages, since under the two years' statute of limitation he could only recover for damages for confinement between March 13 and April 10, 1866. See also *Humphrey* v. *McCormick* (1866), 27 Ind. 144; and *Washington Weekly Chronicle*, March 16, 1867.

it was first made public.[1] By the Reconstructionists, the decision was regarded as a reversion to the theory of constitutional law held by opponents of the Union; they claimed that the Court's doctrine, if applied in war time, would have resulted in the loss of the war; and they asserted that the Court had now joined hands with President Johnson in an effort to destroy the Congressional plans for Reconstruction. An illustration of this feeling as to the majority opinion is to be seen in a letter written to Chief Justice Chase by John Jay: "If, as the public begin to fear, their denial of the powers of Congress is any index to the view they are prepared to take of the great questions that will come before them in reference to Reconstruction, our situation is certainly a grave one . . . to surmount the formidable opposition, no longer of an obstinate President defying the will of the people, but of an Executive furnished with a constitutional standpoint, by the Supreme Judiciary giving validity to his acts, and checkmating Congress at the most eventful moment by denying its powers and annulling its legislation. I cannot yet consent to believe that we are brought into this dilemma, and that appointees of Mr. Lincoln are ready to imitate the late Chief Justice, in making the Court the chief support of the advocates of slavery and the Rebellion." [2] The virulence of attack upon the Judges can only be appreciated by a comprehensive perusal of the editorials of the day, of which the following are illustrative.[3]

[1] See *Salmon Portland Chase* (1899), by Albert Bushnell Hart. The Washington correspondent of the *New York Times* wrote, Dec. 27, 1866: "There is much confusion in the public mind as to what the Court actually did decide, and the publicity of the decision is anxiously looked for, especially as the Court, in order to prevent an imperfect synopsis of the decision from going forth, denied the reporters present the usual privilege of taking notes." The decision in full was given to the public through the press for the first time on Jan. 1, 1867.

[2] *Amer. Hist. Ass. Rep.* (1902), II, letter of Jan. 5, 1867.

[3] *New York Times*, Jan. 3, 1867; *Indianapolis Daily Journal*, Jan. 2, 1867,

"In the conflict of principle thus evoked, the States which sustained the cause of the Union will recognize an old foe with a new face," said the *New York Times*. "It is the old dogma of rigid construction as applied to the National Government and liberal construction as applied to the States on the one hand, and on the other, the common sense doctrine that the Constitution provides for the permanence of the Union, and for such an exercise of authority by Congress as may be necessary to preserve the National existence. . . . The Supreme Court, we regret to find, throws the great weight of its influence into the scale of those who assailed the Union and step after step impugned the constitutionality of nearly everything that was done to uphold it. . . . The whole Copperhead press exults over the decision. . . . They shelter themselves behind Justice Davis and his Associates, and indirectly renew their assault upon the policy that dictated and guided the war for National unity. . . . The newly declared reliance of the President and the Southern States upon the interposition of the Supreme Court has a certain apparent justification in this decision." The *Indianapolis Journal* said that the decision was "such as to create misgivings in the mind of the patriotic people who saved the Nation from destruction at the hands of rebels." Admitting that, under some circumstances, a decision against military tribunals "would be an invaluable defense to popular liberties, here it is intended only to aid the Johnson men, and is so clearly a forerunner of other decisions looking to a defeat of Republican ascendancy and to a restoration of Southern domination, that the indignation against the Court is just

Cleveland Herald, Jan. 3, 4, 5, 7, 1867; *Independent*, Jan. 10, 1867; *Cincinnati Commercial*, Jan. 3, 4, 5, 1867.

and warranted." But, it concluded, "the Court cannot enforce its reactionary dogmas upon the people. The decision carries no moral force, and cannot bind coördinate departments." The *Cleveland Herald*, speaking of "the late alarming pronunciamento called a decision of the Supreme Court" termed it a "judicial tyranny." "The Milligan decision now occupies the most prominent place in the political situation," it said. "A new and most mischievous weapon has been placed in the hands of those who oppose the great Union party." It stated that, had the decision been made early in the war, "our country would have been compelled to pass through an ordeal of blood and turmoil that would have shaken society in all its phases to its centre, even had not the rebellion been successful in overthrowing the Government. . . . If the doctrine avowed by the majority be sound, this Government is but a wisp of straw. . . . It is well enough to talk about the military power being subservient to the civil, when the civil power can stand; but when war has trodden down the civil power, he is either a traitor or a granny who hesitates as to employing the military power, either its bayonets or its Courts, to preserve the life of the Nation. The minority, as in the *Dred Scott Case*, will receive the thanks of all loyal men who would seize any means within reach to save a government from the hands of traitors who could subvert it, while its timid defenders were poring over dusty, musty tomes, seeking the proper civil remedy." It "has produced a profound impression," said the *Independent*. "It virtually declares that Lincoln's assassins suffered a juridico-military murder. . . . We regard it as the most dangerous opinion ever pronounced by that tribunal. . . . Nor shall we waste

criticism on the verbose sophistries with which they labor to conceal the iniquitous doctrines propounded. . . . So far as it bears upon the actual points in issue and is a determination of the case under review, it will be yielded to. Beyond this, it will be treated as a mere partisan harangue, unseemly, because of the source whence it emanated . . . a sorry attempt of five not very distinguished persons to exhibit themselves as profound jurists, whereas they have only succeeded in proving themselves to be very poor politicians. We regret this decision on many grounds. The Supreme Court had begun to recover the prestige tarnished by the Dred Scott decision. . . . The recent decision restores the Court to the bad eminence it occupied when Taney dictated its decrees, and will again withdraw from it that entire confidence which a loyal people would fain repose in its adjudications." The *New York Herald* was especially savage on the Court, and, in a series of editorials, demanded its reformation. "The decision in the Indiana Case may be according to the strict letter of the Constitution," it said. "But in adhering to the strict letter, we must go back to President Buchanan's decision, that he could find no authority in the Constitution to interfere with a seceding State. . . . It is in this view of the Indiana decision, ignoring the vital necessities of the Government during the Rebellion, that a reconstruction of the Supreme Court, adapted to the paramount decisions of the war, looms up into bold relief, on a question of vital importance. . . . As the Court now stands, away behind the war, we hold that there is good reason to fear that its judgments, yet to come, in regard to the doings of Congress during and since the war, including the abolition of slavery and the creation of our present National

debt, if not provided for in season, may result in a new chapter of troubles and disasters to the country." Again it said: "This two-faced opinion of Mr. Justice Davis is utterly inconsistent with the deciding facts of the war, and therefore utterly preposterous. These ante-diluvian Judges seem to forget that the war was an appeal from the Constitution to the sword. . . . This constitutional twaddle of Mr. Justice Davis will no more stand the fire of public opinion than the Dred Scott decision." [1] "It is a marvelous fact," said the *Cleveland Herald*, "that each of the two decisions of our Federal Supreme Court which has gone the farthest to sustain slavery and to paralyze the arm of our Government in putting down the rebellion — to wit the *Dred Scott Case* and the *Milligan Case* — was a decision falling under the title of an *ipse dixit*, a mere extra-judicial assertion of the Judges." "Like the Dred Scott decision, it is not a judicial opinion; it is a political act. . . . The Dred Scott decision was meant to deprive slaves taken into a Territory of the chances of liberty under the United States Constitution. The Indiana decision operates to deprive the freedmen, in the late rebel States whose laws grievously outrage them, of the protection of the freedmen's Courts," said *Harper's Weekly*. That this decision, which has since been recognized by all men as the palladium of the rights of the individual, should at the time of its rendition have been so generally compared with the *Dred Scott Case* is a striking commentary on the passionate political conditions of that era.[2]

[1] *New York Herald*, Dec. 19, 20, 23, 1866, Jan. 2, 8, 1867. In a later editorial, Jan. 5, it termed the Court "a relic of the past, nine old superior pettifoggers, old marplots, a formidable barrier to the consummation of the great revolution."

[2] *Cleveland Herald*, Jan. 4, 1867; *Harper's Weekly*, Jan. 19, 1867, editorial entitled "The New Dred Scott." See also *New York Times*, Jan. 3, 1867, and numerous papers comparing the *Milligan Case* to the *Dred Scott Case*.

The most virulent assault upon the Court was made by John W. Forney, in the *Washington Chronicle*, the semi-official organ of the Republican Senate, and the constant opponent of the *National Intelligencer* which supported President Johnson. "The decision cannot fail to shock the sensibilities and provoke the severe rebuke of loyal men everywhere," it said in one of its earliest criticisms of the Court. "The exultation of the rebel *Intelligencer* over it will awaken a jubilant echo throughout rebeldom, and the hearts of traitors will be glad by the announcement that treason, vanquished upon the battlefield and hunted from every other retreat, has at last found a secure shelter in the bosom of the Supreme Court." This was very extreme and unjustifiable language, and the personal attack on the Judges' character very properly met with indignant protest from many men who, though disagreeing with the Judges' opinion, were eager to defend their loyalty. Nevertheless the *Chronicle* continued, for a month, to launch a series of violent attacks on Judge Davis and on the Court, which were widely copied and imitated.[1] "We have not met a Republican who does not speak with contempt of the language of Justice Davis," it said. "The people have said, if it is not lawful to whip traitors, we will make it so. . . . The denial of Congressional power has elicited universal condemnation from the people of the country. And the fact that this denial was wholly uncalled for, was well calculated to inspire mistrust of the motives which induced the Judges to drag it into their decision. The masses of the

[1] *Washington Chronicle*, Dec. 19, 22, 29, 1866, and *passim* through January, 1867, and see *Philadelphia Press* and *Philadelphia North American*, *passim* (the latter saying that President Lincoln had "made a mistake in appointing a Judge of the fatal name of Davis"); and furious attacks on the Court and on Chief Justice Chase in *New York Tribune*, *passim*.

American people are not behind these five Judges, in their reverence for the Constitution and their regard for the rights of the citizen; but they will not assent to an interpretation of that instrument, which places the rights of the individual before the safety of the whole people." Again, it said that: "Time and reflection have only served to strengthen the conviction of the partisan character of the decision and the apprehension that it is the precursor of other decisions in the interest of unrepentant treason in the support of an apostate President." To the Court, as a co-conspirator with President Johnson and as a dangerous and reactionary factor in the Government, it devoted several editorials, in the last of which it stated that the decision "has not startled the country more by its far-reaching and calamitous results than it has amazed jurists and statesmen by the poverty of its learning and the feebleness of its logic. It has surprised all, too, with its total want of sympathy with the spirit in which the war for the Union was prosecuted, and necessarily with those great issues growing out of it, which concern not only the life of the Republic but the very progress of the race, and which, having been decided on the battlefield, are now sought to be reversed by the very theory of construction which led to rebellion."

While these criticisms of the *Milligan Case* decision vastly outweighed the applause, the more conservative Republicans and the Democrats hailed it as a triumph of the rule of law over lawlessness.[1] "The laws are no longer silenced by the clash of arms. The supreme tribunal of the country has vindicated their assaulted majesty," said the President's organ,

[1] *National Intelligencer*, Dec. 13, 18, 20, 25, 27, 28, 31, 1866, Jan. 1, 3, 11, 15, 17, 1867; *Nation*, Jan. 10, 1867.

the *National Intelligencer*, on the day after the decision; and it continued with the following memorable words, which rang through the country: "They are disloyal, who, under the pretense of preserving the liberties of the citizen, have disregarded the obligations of the organic law. They are disunionists, who, claiming to fight for the Union, have trampled upon its fundamental bond. And, as in war times, these monopolists of patriotism denounced those who upheld the sacred liberties of the citizen as guaranteed by the Constitution, so now, in the midst of peace, they assail those who maintain the rights of the States as guaranteed by that same instrument. But the Supreme Court has evermore made such an assault upon the rights of the citizen impossible; and we doubt not that, in due time, it will extend its broad aegis over the violated commonwealths of the South." In later editorials, it termed the decision of greater moral weight than any ever rendered, since "neither in the breadth of the issue, the extravagance of contemporary heresies on the subject, nor in the magnitude of the stake could any law cause before that Court compare with this. . . . It establishes the rights of the citizen on an impregnable basis. It is not Milligan, the alleged conspirator, who is set free; but Milligan, citizen, tried by an illegal tribunal. . . . It is not the crime of treason which is shielded by this memorable decision, but the sacred rights of the citizen that are vindicated against the arbitrary decisions of military authority. Above the might of the sword, the majesty of the law is thus raised supreme." And to the "wild attacks of partisan malevolence and malice", and to the diatribes of the Senators, the *Chronicle* and the Bureau of Military Justice and others, calling for impeachment of the

Judges and for reconstruction of the Court, it said: "We defend now the people against the anarchical schemes of those who, in overriding the Court, fearfully imperil our liberties, by striving to impair the public respect for law and for an impartial Judiciary. The anarchists who would destroy the public confidence in the Constitution and its Supreme Court are as dangerous, as the revolutionists who sought to withdraw from that jurisdiction." The *Nation*, Republican in its views, remarked that President Lincoln had "at times seemed to revel in the breach of Acts of Congress, and did so with the approval of a large portion of the public" and that the chief criticism of President Johnson had been his exaltation of Executive power; and it stated that the very men who had previously denounced Presidential usurpation were now talking of "impeaching the Judges for doing what they were bound to do before God and man, come what might. . . . We hope this whole matter, grave and important as it is, will open the eyes of the public to the great danger there is that the breaches of law and of propriety, into which overzeal on behalf of the right now carries us, may be, one day, used against it, in defense of the wrong. It is not very long, since there was a majority in the United States on the side of wickedness, and we may all live to see it again; if we should, we may have sore need, for our own protection, of all the forms and traditions of the law and the Constitution." The *Springfield Republican*, which had been a strong antislavery paper, but which was now less radical in its Republicanism, said that the decision had been "strangely misunderstood and perverted", and that "to suspect such men as Judges Chase, Davis and Wayne of assenting to any doctrine that shall cripple

the power of the Government to suppress rebellion is preposterous. . . . The Milligan decision is simply a reaffirmation of the sacred right of trial by jury. To deny principles so well established and so essential to liberty and justice would not be progress, but a long step backwards towards despotism." It pointed out that the decision would not necessarily operate to prevent action of Congress in Reconstruction, since "the application of the decision of the Court to the Southern States must be governed by opinions of the conditions. The President has proclaimed them at peace, and the civil law in full force. Those who believe that the war is still going on will call for the perpetuation of military Courts." And it very sanely stated its belief that "attempts to excite popular alarm or partisan animosity are false and foolish, and so palpably so that they cannot succeed. The Democrats want very much to be the sole champions of the Constitution and the Supreme Court, and they will not achieve that honor. . . . No good citizen can regret that the Constitution and laws are again declared supreme. If either are faulty or behind the spirit of the age, the people are sovereign, and the process of amendment is easy and direct." [1]

The Democratic papers naturally applauded the decision.[2] "It is both a triumphant vindication of the Democratic party and a happy augury of the future," said the *New York World*. "This decision on a matter which was the main topic of controversy

[1] *Springfield Republican*, Jan. 2, 5, 1867. This paper was one of the few which had recognized the importance of the decision, when rendered in the preceding April; and it had then rejoiced, April 7, 1866, that it would end the "senseless clamor for the military trial of Jefferson Davis and other rebel leaders."

[2] *New York World*, Dec. 18, 19, 21, 25, 1866, Jan. 5, 12, 1867; *Baltimore Sun*, Dec. 22, 1866; *Richmond Enquirer*, Dec. 20, 24, 27, 28, 1866. *Detroit Free Press*, Jan. 8, 11, 1867.

between the Democratic Party and its opponents during the war is the final judgment of the law, as it will be the verdict of history, that the obloquy heaped upon Democrats for their opposition to the arbitrary exertion of authority was undeserved, . . . that the arbitrary proceedings against which they protested were as lawless as they were high-handed. . . . There is always a period of peril to civil liberty. . . . The fact that the Supreme Court has escaped the servile contamination of the times, and pronounces an independent opinion which vindicates a party so traduced and maligned as the Democracy, is full of encouragement." The *Baltimore Sun* rejoiced at the Court's emphatic declaration that the Constitution is the supreme law in war as well as in peace. "With that single sentence the miserable plea of military necessity is torn from human liberty, and men feel again that the chains of despotic power are utterly riven. . . . The great writ of habeas corpus is no longer an idle phrase." It asserted that the decision had greatly increased the confidence of the people in the Court. "Fanaticism, feeling the sting of death in the decision, has already raised a clamor for the overthrow of the Court; but fast anchored in the affections of the American people that tribunal will resist the assaults directed against it, and continue the tranquil and sure arbiter of right." And it said that the decision "needing no commentary, and by its piercing force of truth and logic admitting of no refutation . . . ought to be read by every man who has pride in the name of an American citizen."

That the newspapers in the late Confederate States should rejoice at the decision was also natural; but if there were readers of the *Richmond Enquirer* of

the year 1821 who were alive on December 27, 1866, they must have been astounded to read in its columns, on the latter date, an article highly praising the Supreme Court of the United States for its exercise of the function of testing the constitutionality of legislation, and for its position as one of the needful checks and balances of Government. "It has inspired us with new hope for the future of our institutions," it said. "It could not have been foreseen that the Judiciary both in England and America would have proved, in the main, so pure and incorruptible, so elevated above the passions of the hour, and so fearless and efficient in checking the usurpations of power proceeding from other departments. . . . Now that the Supreme Court has come to the rescue of the Constitution, the future is lighted with signs of good cheer." Later, it pointed out the remarkable freedom from partisan action, as shown by the decision of the Chief Justice, "a high priest of radicalism", and of his Republican Associates, defending the Constitution in direct opposition to the political measures advocated by their Party; and it expressed the ardent hope that the Judges would stand firm, though they had been "reproached as enemies, if not traitors, to their party, threatened with reconstruction, threatened with demolition, insulted, abused and defied. . . . If the authority of the Constitution shall be vindicated, the South is safe and the end of her troubles approaches."

The view expressed by the Democratic press undoubtedly represents, in general, the verdict of history on the immortal opinion of Judge Davis in support of the right of the citizen to protection against arbitrary military action. But there has always been considerable sympathy with the sentiments en-

tertained by the Republicans towards that part of the decision of the four Judges which distinguished the question of Congressional power from Executive usurpation; and an eminent jurist wrote with much reason, fourteen years after the decision: "The minority opinion is the only view which can reconcile jurisprudence with political science, law with policy. It is devoutly to be hoped that the decision of the Court may never be subjected to the strain of actual war. If, however, it should be, we may safely predict that it will necessarily be disregarded. In time of war and public danger, the whole power of the State must be vested in the General Government, and the constitutional liberty of the individual must be sacrificed, so far as the Government finds it necessary for the preservation of the life and security of the State. This is the experience of political history and the principle of political science." [1] That the doctrine asserted by the majority is "calculated to cripple the constitutional powers of the Government and to augment the public dangers in times of invasion and rebellion" (in the words of Chief Justice Chase) is so unquestionable as to excuse both those who were confronting the problems of Reconstruction in 1867, as well as those who may in the future be called on to deal with internal war problems in this country, for hoping for a reversal of the Court's decision on this point. But whatever may be the view as to the law so laid down, there was a serious and well-founded criticism of the propriety of the Court's action in expressing any opinion whatever on the power

[1] *Political Science and Constitutional Law* (1890), by John W. Burgess, I, 250–252. "Political science would confer, and, as it appears to me, the Constitution does confer, the power of determining when and where war exists, upon those bodies who represent the whole United States, who wield the power of the United States and upon whom the Constitution casts the responsibility of the public defence against both the foreign and the domestic foe."

of Congress; and a leading law journal expressed very ably the views of the Bar at the time: [1]

On the main point at issue, all the nine Judges agreed. It is rare that the whole Court agrees on any constitutional question; it is still more rare when the Court agrees to decide an important question in opposition to Executive authority and the current of popular feeling; and such unanimity is too precious a thing to be hid under a bushel. Had this unanimous opinion been given simply and directly, it would have established for ever a solid principle of law, on which, in all troublous times, the country would have relied. It would have been a strong defence against all assaults upon the liberties of the people. It would have commanded universal respect, and would have enlisted in its support the sound judgment and the common sense of the Nation. But the Court did not deliver a unanimous opinion. They divided on a point which was not before them for adjudication. . . . Had they in truth, simply adhered to their plain duty as Judges, they could have united in one opinion on this most important case. We deem the course they saw fit to adopt matter for great regret. Instead of approaching the subject of the powers of the coördinate branches of the government as one of great delicacy, which they were loath to consider, but which they felt bound to pass upon because it was involved in the righteous decision of the cause before them, yet concerning which they had nothing to do, and would have nothing to say, except so far as it was necessary to the determination of that cause, they have seemed eager to go beyond the record, and not only to state the reason of their present judgment, but to lay down the principles on which they would decide other questions, not now before them, involving the gravest and highest powers of Congress. They have seemed to forget how all-important it is for the preservation of their influence that they should confine themselves to their duties as Judges between the parties in a particular case; how certainly the jealousy of the coördinate departments of the government and of the people would be excited by any attempt on their part

[1] *American Law Review* (April, 1867), I, 572.

to exceed their constitutional functions; and how, the more a case before the Supreme Court assumes a political aspect, the more cautious should the Judges be to confine themselves within their proper limits. . . . But, however much the Supreme Court may have provoked criticism, none the less is much of that criticism to be deprecated. And the most alarming feature in such criticism is not indignation that the Judges have decided from political prepossessions, but a feeling that they are to blame if they do not — a feeling that a Judge of the Supreme Court of the United States who gives judgment contrary to the wishes, for the time being, of a majority of the people, or, at any rate, contrary to the wishes of an Administration which raised him to the Bench, is liable to the same just censure that waits upon a politician who has left the party to which he has pledged himself, and votes with the opposition; that a Judge is in fact, a representative to carry out the wishes of a political party. Against this degradation of the judicial office we protest. For what is the Supreme Court mainly established but that it may be a tribunal of last resort, composed of men uninfluenced by Executive or Legislative power or popular impulse, who may do justice, free, as far as the lot of humanity admits, from party passion or political expediency?

The apprehensions of the Radical Republicans as to the disastrous effect of the *Milligan Case* decision upon their policies were fully confirmed by the steps which were taken by the President and by the action of some of the Federal Judges, immediately following the publication of the opinion. President Johnson regarded it as an indorsement of his policy to put an end to military government in the South as soon as possible; and he at once issued orders dismissing all trials of civilians by the military then pending in Virginia and in other States in which the Republicans were claiming that a condition of war still existed; and a similar action was taken by Judge Hall of the United States District Court in Delaware in

ordering the release on habeas corpus of four men convicted of murder of Union soldiers by a military Court in South Carolina.[1] Though the Court spoke of Indiana and any State where the Courts have been open and unobstructed, said the *New York Herald*, "the President insists that the decision applies as well to Virginia as to Indiana, and eager to please the white blood-hounds of the Old Dominion, he orders the dismissal of a military tribunal engaged in trying the murderer of a black man. There is no warrant for such a cruel inference; but the President will not wait, but wishes with unseemly haste to issue his order to all departmental commanders on rebel soil *to respect the decision of the Court.*" The Radical Republicans were even more disturbed by the realization that the logical result of the decision was to declare illegal the trial and conviction of Lincoln's assassins, and to constitute the execution of Payne, Atzerott, Herold and Mrs. Suratt, little more than lynching. "It virtually declares that they suffered a juridico-military murder," said the *Independent*.[2] That their apprehensions were justified became evident when, within a week after the Milligan decision in December, 1866, applications were made to Judge Wayne and to Chief Justice Chase for a writ of habeas corpus by one of these prisoners

[1] See especially as to this case *Boston Daily Advertiser*, Feb. 8, 1867. The *Nation* said, Jan. 3, 1867: "Mr. Johnson has at last found what he imagines to be a snug and safe harbor for his 'policy.' The Supreme Court has come to his aid, and has already declared military commissions illegal — thus putting an end to military interference with the action of the local authorities at the South — and it is fully believed will take strong conservative ground in several cases now before it."

[2] *New York Herald*, Dec. 23, 28, 1866; *Independent*, Jan. 3, 1867. See *Life of Lyman Trumbull* (1913), by Horace White. The Washington correspondent of the *Boston Daily Advertiser*, Dec. 27, 1866, said: "Good lawyers here give it as their opinion that the late decision renders the Secretary of War, the Judge Advocate General and all the members of the Court which tried the assassins, liable to prosecution; while Secretary Stanton holds that it overthrows the Freedmen's Bureau, and renders the Army wholly powerless in the South."

at the Tortugas convicted by military commission.[1] Though Chase denied the application, he based his refusal only on the ground that he had no power to issue such a writ outside his own Circuit; and therefore the question of the legality of the military trial of the prisoner still remained open. This episode brought about an active debate in the House of Representatives in Congress, on January 3, 1867, on a resolution that the Committee on the Judiciary should report on the advisability of a repeal of the habeas corpus law of March 3, 1863, so as "to prevent the Supreme Court from releasing and discharging the assassins of Mr. Lincoln and the conspirators to release the rebel prisoners at Camp Douglas in Chicago." Of the excited political atmosphere at Washington, a Western correspondent wrote: "The President holds that this decision applies to every rebellious State as well as to the loyal; and the bloodhounds are loose all over the South, and the freedmen must take their chances. I am informed on very respectable authority that one at least of the majority Judges in the decision of the Court is very nervous over the result of this blunder. The Justice I refer to was a personal friend of Mr. Lincoln, and claimed to be at that time a staunch Republican. He shudders as he sees the cruelties that are to be perpetrated all over the South under his decision, but it is too late. If a case could properly come before the Court, it would be found that a majority do not hold that military tribunals are unconstitutional in the rebel-

[1] See *Indianapolis Daily Journal*, Jan. 3, 1867; *Springfield Republican*, Dec. 29, 1866; *Boston Daily Advertiser*, Dec. 21, 25, 1866; speech of Reverdy Johnson, Jan. 25, 1867, *39th Cong., 2d Sess.*, 730. It appears that another application for habeas corpus by this prisoner was contemplated later, in 1867, when Judge Wayne should for the first time hold Court on Circuit in Florida, but it was not made, and the prisoner was pardoned by President Johnson in Feb., 1869. See *Life of Samuel A. Mudd* (1906), by Nettie Mudd, letters of Jan. 15, March 25, 1867.

lious States, for Congress holds that they are still in a belligerent condition. . . . Should the Court, however, by any other decision show that it is irrevocably wedded to pro-slavery ideas, to a sympathy for rebels — then a future Congress will reorganize the Court." [1] Another correspondent wrote: "Thaddeus Stevens today visited several of the Departments, and with General Schenck had a long interview with Secretary Stanton. . . . He has a great contempt for the Supreme Court's decision in the *Milligan Case*. He does not favor the project of impeaching several of the Justices, but wants to impeach the President, from whom all the evils flow. General Grant had a long interview with Secretary Stanton today upon the effect of the recent decision of the Supreme Court upon military commissions. It renders the Freedman's Bureau and Civil Rights bills a nullity, and while it is allowed to stand, orders will be issued to prevent any conflict of authority under it. Secretary Stanton, General Geary, General Palmer and all the other army officers who have been on military commissions are hourly liable to criminal arrest and trial. Senator Trumbull who drew up both the above bills agrees with the Supreme Court. The decision creates intense excitement and it is now claimed by the President that the Constitutional Amendment abolishing slavery will yet be declared a nullity. A movement that will be started tomorrow for the impeaching of several of the Justices will meet

[1] *Cleveland Herald*, quoting *Detroit Tribune*, Jan. 2, 1867; see also *Cincinnati Commercial*, Jan. 5, 1867. The *Springfield Republican*, Dec. 29, 1867, said: "All the copperheads and secessionists of this vicinity have jumped to the conclusion that under the recent decision of the Supreme Court military tribunals are unconstitutional in the rebellious States. The language of the decision warrants no such inference. . . . One or two of the Judges who supported the recent decision are said to be not a little nervous over the use the President is making of it at the South."

with favor in the House, where there are a number of military men ready to take the strongest ground against judicial usurpation; but in the Senate, there are no soldiers, and any move like impeachments would be hopeless before the present Senate. Mr. Stevens is preparing some stringent measures to protect the country from the evil tendencies of the Supreme Court."

These accounts were not exaggerated; for the reports of statements made by the President that the Supreme Court was prepared to follow its Milligan decision to its logical consequences and to hold unconstitutional any legislation which contemplated the government of the Southern States by military force, aroused the Republican leaders in Congress to a consideration of means of curbing the Court.[1] The measure most vigorously urged upon them was a reorganization of the Court, the argument for which was strongly set forth as follows by *Harper's Weekly*: "The people have decided that Congress has supreme authority in time of war and must necessarily be judge when and where and how to exercise it. They have decided that States which rebel have not a continuous right to resume at their pleasure their functions in the Union, but are to resume them upon such terms as the victorious loyal people in Congress may deter-

[1] "The President is said to have conferred with several Judges of the Supreme Court in regard to the positions assumed by Congress towards the Southern States, when he announced to the Commissioner from South Carolina, Mr. Wetherby, that the Supreme Court would declare the Amendment unconstitutional, and is thought to have spoken by the card," wrote the Washington correspondent of the *Columbus Morning Journal* (Ohio), Jan. 1, 1867; see also *New York Tribune*, Jan. 1, 1867. But as to this, the *Nation* rightly said, Jan. 3, 1867: "Statements of what 'is said' are of little value unless we know who 'said it.' It is very unlikely that President Johnson knows anything more about the way in which the Supreme Court is likely to decide on any of the great questions of the day than anybody else. The Judges may not be 'sound' on the Reconstruction question, but most of them, at least, still retain a strong sense of judicial propriety, and find better occupation than talking over their decisions with Mr. Johnson."

mine. . . . It is plain that if Congress passes laws the Supreme Court declares unconstitutional and which the President, as Commander-in-Chief, refuses upon that ground to execute, the situation would be critical. But the remedy is obvious and it is not revolutionary. . . . If the Supreme Court undertakes to declare that the people of the United States, at the end of a long and fearful war in which they saved the Government, can do nothing to secure that Government from similar assaults hereafter, let the Supreme Court be swamped by a thorough reorganization and increased number of Judges. . . . The question in regard to the Supreme Court need not be misunderstood. It is not, whether in time of peace in loyal States the civil Courts shall be supreme, which nobody questions. It is, whether loyal men or rebels shall reorganize the Union. . . . The remodeling of the Court may truly be called an extreme measure, to be adopted only in most extraordinary cases, as that which would arise if the five Judges should deliberately undertake to nullify the will of the majority of the people of the United States in reorganizing the Union." [1] This recommendation for a re-formation of the Court, which had been advocated also by the *New York Herald*, was opposed, however, both by Republicans and Democrats, as a "desperate and disgraceful" device to "pack" the Court; and it was pointed out that the Constitution stood in the way of abolition of the Court, and that even if the Judges should be removed, or additional Judges created, it would rest with President Johnson to make the new appointments.

While this measure, therefore, did not secure support in Congress, the debates, during December, 1866,

[1] *Harper's Weekly*, Jan. 19, Feb. 9, March 2, 1867.

and January, 1867, over other bills directed against the Court were long-continued and bitter. The discussion was opened by Reverdy Johnson in the Senate, defending the Court from the infamous charge made against the Judges by the *Washington Chronicle*.[1] "The opinion of the majority was given by a man whose character, public and private, stands beyond possible reproach, placed upon that high tribunal by the lamented late President, loyal throughout the civil contest in which we have been engaged," Johnson said. "The editor to whom I allude thought proper to say that treason had found a refuge in the bosom of the Supreme Court of the United States. I am sure no Senator on this floor will justify such an attack. . . . They (the Judges) will stand upon the character which long lives of honor and integrity have earned for them, while their assailant will reap all the reward to which he may be entitled by such an assault"; and Johnson continued by terming the decision as "not to be surpassed in my judgment, by any opinion pronounced by any Judge in any former case in that tribunal." To this, Thaddeus Stevens, the most savage of the Reconstructionists, retorted that, in his opinion, the decision, "although in terms not as infamous as the Dred Scott decision, is yet far more dangerous in its operation upon the lives and liberties of the loyal men of this country. . . . If the doctrine enunciated in that decision be true, never were the people of any country, anywhere, or at any time, in such terrible peril as are our loyal brethren at the South"; and he spoke of "murderers that were being turned loose under the Milligan decision."

John A. Bingham of Ohio, in the House, proposed

[1] *39th Cong., 2d Sess.*, 210, 251, 269, speech of Johnson, Dec. 20, 1866, Jan. 4, 1867, speech of Stevens, Jan. 3, 1867. See also *Life of Thaddeus Stevens* (1913), by James A. Woodburn.

"sweeping away at once the Court's appellate jurisdiction in all cases"; and he said: "If, however, the Court usurps power to decide political questions and defy a free people's will, it will only remain for a people, thus insulted and defied, to demonstrate that the servant is not above his lord, by procuring a further Constitutional Amendment and ratifying the same, which will defy judicial usurpation, by annihilating the usurpers, in the abolition of the tribunal itself." [1]

Thomas Williams of Pennsylvania urged a bill for the concurrence of all the Judges in any opinion on a constitutional question. "This bill, if passed into a law," a newspaper advocate said, "will practically relieve the Supreme Court of any further interference with Congress in the business of Southern Reconstruction, and it may then operate in a remarkable change of Southern sentiment; for it appears that the main reliance of the intractable, ruling classes of the South now is in the Supreme Court. . . . Nor are these things the mere expedients of party for party purposes. They are the demands of a great revolution, which cannot be resisted but which must run its course." [2]

In the midst of the debates over these measures affecting the Court, the Radical Reconstructionists, who desired to see all participants in the cause of the Confederacy treated as traitors and denied any civil rights or privileges, were still further enraged by two decisions of the Court, rendered on January 14, 1867,

[1] *39th Cong., 2d Sess.*, 249, 286, 501 *et seq.*, Jan. 3, 4, 16, 21, 23, 1867. This suggestion of limiting the appellate jurisdiction of the Court was first made by the leading Republican paper in the West, the *Chicago Tribune*. It also suggested a statutory requirement of the concurrence of eight Judges; see *New York World*, Jan. 21, 1867, in criticism of this proposal.

[2] *New York Herald*, Jan. 23, 1867; see *Cleveland Herald*, Jan. 28, 1867, approving a bill requiring concurrence of two thirds of the Judges.

in *Cummings* v. *Missouri* and *Ex parte Garland*, 4 Wall. 277, 333, — decisions which revealed the Court as wholly unaffected by the tumult raised by its Milligan decision, and which displayed its freedom from prejudices arising from the late war and its utter fairness towards those engaged in it.[1] The first case involved the validity of the provisions of a State Constitution requiring certain persons (a minister of the gospel in the instant case) as a prerequisite to engaging in their pursuits, to take an oath that they had not supported, aided or favored by act or word the cause of the Confederacy; the second case involved an Act of Congress of January 24, 1865, and a Rule of Court adopted in March, 1865, in pursuance of the Act, requiring a similar oath before an attorney should be admitted or allowed to practice before the Court. In the first case, David Dudley Field, Montgomery Blair and Reverdy Johnson argued for the petitioner against John B. Henderson and G. P. Strong for the State of Missouri. In the second, Reverdy Johnson and Matt H. Carpenter argued for the petitioner and Alexander H. Garland (who was later Attorney-General of the United States) also filed a brief *pro se;* the Attorney-General, James Speed, appeared for the Government. The Court held the requirement of the oath in both cases to be unconstitutional; but again it was closely divided. The four Judges appointed prior to the war — Wayne, Grier, Nelson and Clifford — joined with Judge Field, in holding that the framers of the Constitution intended to guard against such "excited action of the

[1] The *New York World*, the *Washington Chronicle* and other papers announced as early as Dec. 8, 1866, that the constitutionality of the ironclad oath case had been decided by the Judges in conference, by a majority of five to four against the radicals." But the *New York Herald* stated, Dec. 10, 1866, that: "Chief Justice Chase denied the rumor." See also *National Intelligencer*, Dec. 13, 1866.

States, under such influences as these"; that "the Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised." Accordingly, the statutes were held invalid as imposing a form of punishment forbidden by the constitutional prohibition against bills of attainder and *ex post facto* laws. On the other hand, Lincoln's appointees — the Chief Justice and Judges Miller, Swayne and Davis — supported the legislation as a desirable protection of the country against disloyal men, and as fixing proper qualifications for the practice of professions; and they denied that the statutes were either bills of attainder or *ex post facto* laws within the meaning of the Constitution.[1]

The attacks on these decisions were again of the most violent character. The *Washington Chronicle* said that they had been made "the fortification behind which impertinent rebels may renew or continue their war upon the Government", and that "dangerous in the encouragement they have extended to traitors, they have nevertheless produced a reaction, which will not stop until the exact relation of that tribunal to the other departments of the Government is absolutely and irrevocably fixed." The *New York Herald* stated that they were of the highest importance in their political aspect, and it again urged a reconstruction of the Court, "to secure such interpretation of the Constitution as will proclaim the great fixed fact that the war for the Union was neither a blunder nor a failure but a great revolution." *Harper's Weekly* said that they were merely "another

[1] See *American Law Review* (1867), I, 575.

proof of the disposition of the Court to withstand the National will and reverse the results of the war." [1] On the other hand, the *New York World* said: "The decisions are an additional proof of the Court's superiority to party passions and popular clamor"; the *Detroit Free Press* congratulated the people "that their liberties are safe as against the despotic and treasonable contentions of Congress, at least until a bloody revolution has overthrown the Supreme Court or until its independence and usefulness is destroyed in some more insidious but perhaps more dangerous manner"; and the *National Intelligencer* said that: "It may suit the purposes of corrupt and unscrupulous partisans, alike in the press, the forums and the pulpit, to impugn the motives of the learned Judges who interpret the organic law of the Nation under a solemn sense of their responsibilities; but the plain people will not believe that they can be swerved from their sworn duty, by any sinister or improper inducements. Full of years, and full of honors, with no other ambition than to live in history as the wise and well qualified guardians of those principles which, embodied in the Constitution, constitute at once the boast and safeguard of the Nation, they are as incapable of being seduced into partial, much less political, decisions, as they are incapable of being intimidated by the threats of brawling politicians or the coarse vituperation of unprincipled editors. In an era of revolutionary convulsion, they yield neither to the passions of the mob, nor the invective of the

[1] *Washington Chronicle*, Feb. 16, 1867; *New York Herald*, Jan. 16, 1867; *Harper's Weekly*, March 2, 1867; *New York World*, Jan. 15, 1867, charging Chief Justice Chase, in dissenting in these cases, as "acting a most unworthy and responsible part", "acting with a bias", since he had already advised President Lincoln in regard to them; *Detroit Free Press*, Jan. 16, 1867; *National Intelligencer*, Jan. 15, 1867; the *Springfield Weekly Republican*, Jan. 19, 1867, noted with gratification that the division of the Judges was not based on political lines.

demagogue. . . . We simply congratulate the country that though, amid the clash of arms, the sacred rights of the citizen were somewhat infringed, yet, with the return of peace, the Constitution is vindicated in all its fullness and integrity."

The effect upon Congress was to strengthen the demand for legislation to curb the Court; and George S. Boutwell of Massachusetts at once introduced a bill in the House to nullify the Court's decision by providing that it should be a rule in all the Courts of the United States that no person who had been engaged in the Rebellion or supported its cause should act as an attorney in those Courts.[1] "It is an offence to the dignity and respectability of the Nation," he said, "that that tribunal, under the general authority vested in it under the Constitution and the laws, does not protect itself from the contamination of rebels and traitors, until the rebellion itself shall be suppressed and those men shall be restored to their former rights as citizens of this country. The Supreme Court failing in the performance of this high and self-protecting duty, the time has arrived when the Congress of the United States, by whose breath alone the Supreme Court enacts rules of any sort, or admits any man to the office of counsellor or attorney at its Bar, should assume exact and specific authority to declare by solemn law, that men who have been guilty of murder or treason or bribery, or who have raised their arms to strike down the Government of this country, shall not participate in the administration of the laws of the land, until they are absolved from their armies."

[1] *39th Cong., 2d Sess.*, Jan. 22, 1867, 646–673; *Springfield Republican*, Jan. 26, 1867; *Philadelphia Inquirer*, Jan. 24, 1867; see also the accounts of this bill in *New York World*, Jan. 24, 1867; *National Intelligencer*, Jan. 15, 1867; *Boston Daily Advertiser*, Jan. 23, 1867.

The bill did not meet with warm support, even in the Republican press. "The bill is an attempt to neutralize the decision of the Court. It strikes the country as designed to place these two branches of the Government in direct and open antagonism but that Act itself will probably prove a nullity. Congress is not the final judge of the validity of its own acts, and cannot make itself so, while there is a Constitution and a Supreme Court," said the *Springfield Republican*. On the other hand, the *Philadelphia Inquirer* warned the Court that either it would be obliged "to succumb, or to take the high ground that it is beyond Congressional control in matters of detail and practices connected with the organization of the Court. It would be of dangerous consequence for the Judges to assume any such view; as the Court is, as to administration, constituents, and regulation, entirely within the authority of Congress and the laws."

Boutwell's bill and other corrective measures failed of adoption. Nevertheless, the radical attitude of the majority portended trouble for the future, and was truthfully described by a Democratic Congressman, when he said in one of the debates that, since the decisions of the Court were "in irreconcilable conflict with all the leading measures and policies of the dominant party in Congress, and, by the plainest logical sequence, pronounce judgment of condemnation against them all in advance, hence arises the growing hostility of radicalism towards that great tribunal. The country may well anticipate an early attempt by the radical despotism, that now claims to be the 'Nation' and to measure its power by its own will, to reduce that last citadel of National safety to its control, and to make the Judges mere clerks, to record as law the edicts of party and caucus."

CHAPTER THIRTY

RECONSTRUCTION

1867–1869

THOUGH exceedingly apprehensive as to the attitude of the Court toward its proposed Reconstruction legislation, Congress did not allow itself to be deflected from its firm purpose to adopt such measures as it believed imperative. Accordingly, in March, 1867, it proceeded to enact a series of statutes (over the constitutional objections raised by Presidential veto), providing for military government in the Southern States.[1]

Within three weeks after their passage, the long-expected attempt to obtain a ruling of the Court upon the validity of military government in time of peace was consummated, when, on April 5, 1867, a motion was made by Robert J. Walker, Alexander H. Garland and William L. Sharkey for leave to file an original bill in equity in the Supreme Court on behalf of the State of Mississippi, to enjoin "Andrew Johnson, a citizen of the State of Tennessee and President of the United States and his officers and agents appointed for that purpose, and especially E. O. C. Ord, assigned as military commander of the district . . . from executing or in any manner carrying out the Acts of March 2,

[1] See Act of March 2, 1867; Act of March 23, 1867; Act of July 19, 1867; Act of March 11, 1868; and the Act of June 25, 1868. See also *History of the Reconstruction Measures of the 39th and 40th Congresses 1865–68* (1868), by Henry Wilson; *Military Government of Southern Territory*, by A. H. Carpenter, *Amer. Hist. Ass. Rep.* (1900), I.

and 25, 1867.[1] Attorney-General Stanbery objected to the filing of the bill on the ground that it contained "matter not fit to be received." The occasion was thus described by one who was present. "Those who attended the Court-room were witnesses to one of the most significant and remarkable scenes which ever occurred in any hall of justice. William L. Sharkey and Robert J. Walker as counsel for the people of the State of Mississippi rose in their places and asked leave to file an injunction, restraining the President and military commanders from enforcing the Reconstruction Act, on the ground of its unconstitutionality. For the first time in the history of any nation, the legal representatives of the participants in an organized rebellion, defeated in the field, were permitted to appear in Court, not to defend their clients on trial, but to arraign and deny the authority of the law-making power, and to plead anew the issues of the cause already decided by the sword. After accepting the terms of surrender, they propose in the Supreme Court to test the very right admitted by their surrender. No greater effrontery on the part of insurgents and rebels against legal authority has ever been witnessed; and no instance on the part of any other government can be quoted, as this in which the highest tribunal of the

[1] Ex-Judge John A. Campbell, over six months before, was preparing a suit to test the validity of the military tribunals which had been established by President Johnson in Mississippi. In a letter to Benjamin R. Curtis, July 22, 1866, Campbell wrote that he had just been to Washington in connection with the case of a supervising agent of the Treasury not connected with the military service and charged with appropriating captured cotton and "in the clutches of a military commission at Mobile. It was a good case to try the potency of these 'new minted judicatures', as Prynne styled Strafford's military commissions that were trying men 'by an arbitrary, summary, illegal and martial proceeding, without any lawful presentment or trial by a sworn, impartial able jury, diametrically opposite to the fundamental laws, customs, great charters, statutes of the realm, and inherent liberty of the subject.' . . . I hope that D——, who is not a guilty criminal, will be allowed a trial by a Court and not delivered over to the military commission's tender mercies. The record in his case is a curious specimen of 'Military Justice' of which I am told there is a Bureau at Washington." *Benjamin R. Curtis MSS.*

country patiently sits to hear arguments, which, if admitted, would declare the war for the Union to have been unjust and oppressive." And the *Independent's* Washington correspondent wrote: "A few rebel leaders of the proscribed class are trying to break down the Reconstruction Act through the Supreme Court. . . . They cannot succeed. . . . Congress found a way to carry its plans into execution against the opposition of the President, and it is able to sense means to carry out its purposes if the Supreme Court puts itself in the way. The proceedings yesterday in Court indicate that the President will execute the Act and that he will give no open encouragment to the rebel Governors." [1] On April 12, the power of the Court to exercise jurisdiction over the President was argued. The petitioners relied on Chief Justice Marshall's decision in the Burr treason trial, sixty years previous, sustaining the right of the Court to issue a *subpoena duces tecum* to President Jefferson. The Attorney-General argued vigorously as to the extraordinary results which would follow from an attempt by the Judiciary to control the acts of the Executive. "The scene was the most notable that has been witnessed in the Chamber of the Supreme Court for a long time," wrote a newspaper correspondent. "One marked the intellectual face of Mr. Trumbull, the fine forehead and weak mouth of Charles O'Conor, the

[1] *Independent*, April 10, 1867; the *New York Herald*, April 6, 1867, printed an editorial headed "Mississippi before the Supreme Court. The Old Southern Twaddle but a most important movement"; and said that the decision "will at all events, from the gravity of the subject, be waited for with the deepest interest by all parties." The *New York World*, April 4, 11, 1867, said it thought the Court would evade the issue, and that it did not suppose Sharkey himself had "any sanguine hope of success." The *Springfield Republican*, April 13, 1867, said that "Judge Sharkey denies that the President had anything to do with his attempt. . . . He says that he does not know the President's opinion on the subject, and when he notified him of his intention to petition for an injunction the President expressed neither approval nor disapproval."

See *Reconstruction and the Constitution* (1902), by John W. Burgess, 144 *et seq.*

Mephistophelian features of Montgomery Blair, the cunning eyes of Robert J. Walker, the classic profile of Roscoe Conkling, the white hair and florid countenance of Judge Sharkey, the mastiff jaws of Reverdy Johnson, Ex-Senator Harris genial and dignified, the Attorney-General bland and courteous, Mr. Cowan seemingly troubled with self-consciousness, the Ex-Attorney-General, Mr. Black, jocular and uneasy, and Governor Jenkins of Georgia grave and courtly. . . . The Attorney-General spoke an hour and was listened to with the closest attention throughout. Tall, spare, angular in action, of the sweetest personal courtesy, Mr. Stanbery is a most unique type of an old-fashioned gentleman, admired by his friends and seemingly respected by everybody. . . . The Attorney-General's manner was quite as impressive as his language. . . . He spoke with a clear voice, and held the fixed notice not only of the audience and of the attorneys but of every member of the Supreme Bench." Walker's argument was described as of little interest and as "adroit and specious." "Small, dapper, with a squatty appearance, sharp of feature and sharp of voice, with foxy manners and blinking eyes, Mr. Walker is quite as unique in his way as the Attorney-General. Equally easy and courteous, he lacks Mr. Stanbery's frankness and earnestness." Another correspondent wrote: "The Supreme Court presented a striking scene. It was crowded with distinguished officials, great lawyers and curious civilians. Two rebel States, which for four years fought with all their ability to overthrow the Government and to escape from its control, appeared in the Court to claim that during all that four years of cruel war, they were States in the Union and entitled to the same immunities and privileges as New York, Ohio and any of the loyal

States. This was a fine illustration of the humility of our 'conquered rebels.'" To this criticism, the *New York World* replied: "The South has heretofore refused to recognize the Supreme Court as the ultimate arbiter between the States and the Federal Government in disputed questions. The present applications ought, therefore, instead of the reprobations they have called forth in some quarters, to be accepted in a spirit of congratulation, as a signal token of the great change public opinion has undergone in the South." [1]

Although the *Independent's* correspondent stated that: "There is but one opinion here among men of all parties, as to the result; the Court will refuse to grant leave; this tribunal, already suspecting that, as now constituted, it is regarded as a diseased member of the body politic, will not run the risk of amputation by touching the edged tools of Sharkey and Walker," there were others who were not so confident as to the Court's action; and Francis Lieber wrote to Charles Sumner: "I imagine that at no time in our history have there been so many ears pricked up, in all portions of our country, for a coming decision, as at present, for the decision of the Supreme Court. . . . As it appears to me, the Court has only to decide between two laws presumed to conflict — a necessary consequence of an enacted (or written) Constitution. It leads to many inconveniences; but where parties contend, justice must be done. If we could obtain some archangels to sit, after each Congress, to decide on the laws of Congress, then we might make consti-

[1] *Boston Daily Advertiser*, April 13, 1867; *Independent*, April 16, 17, 1867; see *Philadelphia Inquirer*, April 13, 1867, for full report of the arguments of counsel; *New York World*, April 17, 1867. *Harper's Weekly*, April 20th, 1867, in an editorial headed "Rip Van Winkle in the Supreme Court", said that the arguments set forth in great amplitude "the old fallacy, thoroughly exposed and exploded, that once a State, always a State", and termed them "a desperate effort to undo in a Court the decision of a war."

tutionality a general question; but, with all respect for our Supreme Court, or for many of the Judges at least, I have never seen the angelic wings penetrating the gown."[1]

On April 15, 1867, within three days after the argument, the Court, through the Chief Justice, rendered a decision in which it avoided the delicate issue as to its power to control Executive acts in general, and contented itself with holding that, inasmuch as the actions involved in this case were not ministerial and required Executive discretion, the Court "has no jurisdiction of a bill to enjoin the President in the performance of his official duties, and no such bill ought to be received by us."[2]

Undiscouraged by this failure, counsel for the States of Georgia and Mississippi made another attempt to test the validity of the Reconstruction legislation by asking leave to file bills praying for injunctions to restrain Secretary of War Stanton and General Grant from executing the provisions of the Reconstruction Acts, and setting forth that the design of these Acts was to annul the existing State Governments and to subject the people to military rule. The Court deciding to allow these bills to be filed, on consent of the Attorney-General, they were set down for immediate argument.[3] Con-

[1] *Life and Letters of Francis Lieber* (1882), letter of April 14, 1867.

[2] *Mississippi* v. *Johnson*, 4 Wall. 475.

[3] See *Cleveland Herald*, April 15, 27, 1867: "Sharkey's New Rebellion, as developed in the Supreme Court today, drew forth a motley audience, who crowded the Court-room. . . . Most of them were rebels and sympathizers who did not look as if they were aware that the late rebellion was over. . . . The clear, strong argument of the Attorney-General seemed easily to overbear the formidable array of legal talent engaged in this new crusade against the peace of the country — Ewing, Johnson, Black, O'Conor, Edgar Cowan, Sharkey, Walker." See also especially *Philadelphia Inquirer*, April 17, 1867; *Boston Daily Advertiser*, April 16, 18, 19, 1867. The *Springfield Weekly Republican*, April 20, 1867, said that: "There is no expectation that the Court will grant the injunction prayed for, whatever may be the opinions of the Judges as to the constitutionality of the law. Even if the Court should grant the petition, final action will not be taken till next December, and by that time Reconstruction will have been completed in nearly every Southern State. We have no doubt the Southern people prefer to have it so."

servatives and Radicals alike approved this course, both believing that it was better that the Court should say at once whether it would take jurisdiction in this manner over the Reconstruction question. And the Radicals expressed the view that, if the Court should now decide against the bill at the present Term: "The whole South will understand at once that the Court will not step in between Congress and rebels, not at present certainly, and not early enough in any event to do any good or harm. As a matter of course, in due time, a case can be made up in one of the inferior Courts against the Military Act; but a decision of the Supreme Court could not be reasonably expected before 1869. By that time the rebellious States will be thoroughly reconstructed." [1] The case was elaborately argued on April 26, May 1, 3, 6, 1867, by Charles O'Conor of New York and Robert J. Walker of Mississippi in behalf of the States. They were opposed by Attorney-General Stanbery, who, though stating that personally he was opposed to the Reconstruction measures, nevertheless, made an exceptionally powerful argument against the jurisdiction of the Court over the purely political question presented by the bills in equity before it. "The little Court-room was filled but not at any time crowded. One fourth of the spectators were ladies, some of them well-known secessionists," wrote a correspondent. "The attendance of young and unknown lawyers was quite large. For the rest, there was Chief Justice Cartter of the District Court, shrewd and practical in every feature; good old Tom Ewing with his bald head and jovial double chin; Senator Morgan, grave and dignified; the Secretary of the

[1] *Independent*, April 25, 1867. On May 2, it said: "There is but one way for the Court to obtain jurisdiction of the Reconstruction Acts and that is by appeal from a State Court. To do this will take so long that the South can obtain no relief."

Treasury, bland and unruffled; Thomas J. Durant, the sad-faced and thin featured New Orleans Unionist; Judge Black, with his sardonic smile and white eyebrows and black wig; rugged Joshua Hill, the Georgia Loyalist; and a goodly number of white-haired Washington Rebel sympathizers." [1]

Only ten days later, the Court rendered a decision dismissing the suits, and holding that they called for an adjudication on rights, not of persons or property, but of a political character, of sovereignty, of corporate existence as a State, and that it had no jurisdiction over such a controversy — *Georgia* v. *Stanton*, 6 Wall. 50. "Undoubtedly, it is no light matter," said the *Nation*, "that the highest Court in the land should thus disclaim the power of enquiring into the constitutionality of an Act of Congress destroying the government of ten States. For it must be observed that every word of Mr. Stanbery's argument would be just as applicable if Massachusetts, instead of Georgia, were the complainant, and if Congress had undertaken to overthrow a State government which it at the same time admitted to be perfectly legitimate. No State in the Union, therefore, can rely upon the Supreme Court for protection against the usurpation of Congress. This is a grave fact which deserves serious consideration, and yet, notwithstanding all the perils of such a decision, it is clear that it is justified by reason and ex-

[1] *Boston Daily Advertiser*, April 27, 1867; see also especially *Philadelphia Inquirer*, April 29, 1867; *Nation*, May 2, 9, 16, 1867; *Harper's Weekly*, May 11, 1867. Welles wrote in his diary, April 29, 1867: "The injunction cases in behalf of Georgia and Mississippi have been before the Court and are still pending. Attorney-General and Mr. O'Conor made arguments on Friday. The latter is evidently more of a lawyer than statesman, studies law more than Constitution, cases more than governmental principles. Nothing will be got from the Court, I apprehend, and there are embarrassments in the case. The Attorney-General's position cannot be subscribed to in all respects. Why O'Conor and his associates make no use of the recent decision of the Court in Milligan's case, I don't understand. Congress under color of law, cannot invest brigadiers with power to abolish jury trial or to suspend the privilege of habeas corpus in time of peace."

perience. . . . Purely political controversies are, of all things, the least amenable to the jurisdiction of a Court. The origin and existence of a State, the existence and justice of a war, or the validity of a revolutionary change in the form of government, are all of them questions which no nation ever allowed Courts to determine. . . . The immediate results of the decision just rendered by the Court are unqualifiedly beneficial. Even if the suit had been merely entertained without a decision upon the merits, the effect upon the South must have been injurious, while it is difficult to estimate the mischief that might have been wrought by the entire success of the complainant. It could not have saved the State from the ultimate control of Congress, and it would have introduced new elements of evil into the conflict. We think that every intelligent Southerner — certainly every shrewd lawyer or politician — feels relieved by the decision. Certainly, it is a cause for congratulation among all friends of regulated liberty. The speedy reorganization of the South under the Reconstruction Act is now made all but certain." The *Springfield Republican* said that the decision was "what all sensible persons expected. . . . The Court is not going to establish so dangerous a precedent." [1]

One last attempt was now made by counsel for Mississippi to amend their bill so as to show a property interest in the State in matters affected by the actions of the defendant military commanders; but this motion was denied by an equally divided Court; Wayne, Clifford, Nelson and Field being in favor of granting

[1] *Nation*, May 23, 1867; *Springfield Weekly Republican*, May 18, 1867. The *Philadelphia Inquirer*, May 17, 1867, spoke of "those remarkable geniuses, Sharkey and Walker . . . the first to imagine that an Act of Congress might be nullified by the special injunction of a Court of equity — an original doctrine which the Court have not yet comprehended." See also for an interesting criticism of Black's argument, *Washington Weekly Chronicle*, May 18, 1867.

leave to amend, the Chief Justice, Swayne, Miller and Davis being opposed. Owing to the absence of Judge Grier, who, had he been present, would have probably favored the motion, the question whether the Court could interfere with the Reconstruction legislation in order to protect the public property of a State remained undecided; and Congress was left with a free hand.[1] While the decision of the Court, that it would not take jurisdiction when the facts of the case involved only political and not personal or property rights, enounced no new doctrine of law, the Democrats throughout the country were inclined to believe that the Court was evading its responsibilities by refusal of jurisdiction, and criticized it for its course. "What is to become of the Supreme Court of the United States — the conservative branch of the Government?" wrote James Buchanan. "When I recall the names of the pure, able and venerable men who have filled the office of Chief Justice from John Jay to Roger B. Taney, and witness the efforts of the present Chief Justice to drag the judicial ermine through the dirt to propitiate radicals, I cannot help thinking we have fallen on evil times. But I am now an old fogy." [2]

Though the Reconstruction legislation had thus become safe from injunction, its constitutionality was brought before the Court at the next Term, in December, 1867, in an unexpected manner, through the operation of a statute recently enacted by Congress for the protection of Federal officials and other loyal persons against adverse action by the Courts and officials in the late Confederate States. Under this new

[1] *Boston Daily Advertiser*, May 17, 1867; the *Springfield Weekly Republican*, May 18, 1867, said that the motion to amend by asking for an injunction against Gen. Ord's taking possession of the Mississippi State Treasury, was denied by a divided Court, the names of the Judges being withheld. "All legal obstacles to Reconstruction are now removed."

[2] *Works of James Buchanan* (1910), XI, letter of June 11, 1867.

Act of February 5, 1867, appeals from the Federal Circuit Courts to the Supreme Court in habeas corpus cases, which had hitherto been allowed in a very limited class of cases, were now extended to "all cases where any person may be restrained of his or her liberty, in violation of the Constitution or of any treaty or law of the United States." By an ironic stroke, this Act designed to enforce the Reconstruction measures was now seized upon as a weapon to test their validity. An editor named McCardle, who had been arrested and held for trial by a military commission in Mississippi under authority of one of the first Reconstruction Acts, petitioned for a writ of habeas corpus in the Federal Circuit Court, and after an adverse decision took an appeal to the Supreme Court. On January 10, 1868, Jeremiah S. Black, counsel for McCardle, moved that the case be advanced for speedy hearing. Attorney-General Stanbery stated to the Court that, as he had already officially advised the President that the Reconstruction Laws were unconstitutional, he could not act on behalf of the Government, and that he had so notified the commanding military officials concerned. On January 17, the Court granted the motion and set the case for the first Monday in March. "This decision," said a leading Republican paper, "gives satisfaction to the Radicals, as they hope by that time to have affairs in such condition in the States of Mississippi and Alabama that, even if the Court decides the Reconstruction Acts unconstitutional, it will not seriously impede the work in those States." [1] It was reported that the Judges were divided on the question

[1] See especially as to the proceedings in this case, *Indianapolis Journal*, Jan. 18, 1868; *Chicago Republican*, Jan. 11, 17, 18, 22, 1868. On Feb. 1, it said that: "The speech of Jerry Black was an extremely bitter copperhead harangue on State-Rights and the unconstitutionality of the Reconstruction laws. He evidently argued the McCardle case *con amore*."

of advancing, as follows — Judges Grier, Clifford, Nelson, Davis and Field, against Chief Justice Chase, Judges Swayne and Miller; and the newspapers believed that there would be a similar division on the constitutionality of the laws. Before the final hearing, however, vigorous arguments were heard by the Court, on January 31 and February 1, on its right to take jurisdiction of the case under the new habeas corpus statute, Jeremiah S. Black, David Dudley Field and William L. Sharkey appearing for McCardle, and Matt H. Carpenter, Lyman Trumbull and James Hughes for the Government.

Meanwhile, rumors that the Court intended to hold the Reconstruction Laws invalid,[1] and the fact that the impeachment of President Johnson was already being discussed, had convinced the Reconstructionists in Congress of the necessity of some form of action which should save their imperiled legislation. Accordingly, with the intent of averting such an adverse decision by the Court, the Judiciary Committee of the House reported a bill to provide that, in any case involving the validity of a law of Congress, two thirds of the Judges must concur in an opinion adverse to the law.[2] In the debate which ensued, the Court was warmly defended by John V. L. Pruyn of New York and Samuel S. Marshall of Illinois, the latter stating that he con-

[1] The *Springfield Republican*, Jan. 10, 1868, speaking of the rumor that the Court was to hold the laws invalid by a vote of five to three, said: "It is not easy to understand why Congress should be disturbed about it. Mr. Stevens always said that these Acts and much other legislation for the South were 'outside of the Constitution', and the only real support has been found in the supposed right of Congress to exercise the war power over conquered States. Of course, the Constitution recognizes no such power." *Ibid.*, Jan. 25, 1868.

[2] *40th Cong., 2d Sess.*, 478 *et seq.* The bill was stated by Thomas Williams, Jan. 13, 1868, to be a copy of a bill introduced in the last Congress "which seemed at the time of its introduction to startle the profession, and, to some extent, the country at large." See especially speech by Wilson of Iowa, Jan. 14, 1868, 492–498, attacking Judges Swayne and Chief Justice Chase and defending Judge Field and the Court against Radicalism.

sidered the bill "revolutionary and dangerous . . . one of the worst of the revolutionary measures brought forward to subvert and destroy the institutions of our country, which have caused such widespread gloom and despondency. . . . This measure is hurried through here this morning to prevent an adjudication of the validity of their motley Reconstruction Acts. . . . It is a confession of guilt on the part of the majority. It is evident that they feel and know in their hearts that their legislation will not bear investigation by a legal tribunal, made up now principally of members of their own party, placed there by their own favored President." George W. Woodward of Pennsylvania declared that Congress had no power to prescribe the number of Judges necessary for a decision, or to dictate to the Court how it should decide constitutional questions. On the other hand, in support of the measure, Rufus P. Spalding of Ohio declared that "for everything except its official life, that tribunal must look to an Act of Congress"; and John A. Bingham of Ohio, in a savage onslaught, urged that as Congress had full power over the Court, it could even limit its number to three, of which two or even three should be required as a quorum.[1] The bill passed the House by a vote of one hundred and sixteen to thirty-nine, and it was warmly supported by the Radical Republican press.[2] "There is danger of an adverse

[1] James F. Wilson of Iowa proposed to amend the Committee amendment as follows: "Provided however, that if any Circuit or District Court of the United States shall adjudge any Act of Congress to be unconstitutional or invalid, the judgment, before any further proceeding shall be had upon it, shall be certified up to the Supreme Court of the United States and shall be considered therein, and if upon consideration thereof, two thirds of all the members of the Supreme Court shall not affirm such judgment, the same shall be declared and held reversed." This new modification was defeated by a vote of twenty-five to one hundred and twenty-four.

[2] *Independent*, Jan. 23, 1868; *Harper's Weekly*, Feb. 1, 1868; *Indianapolis Journal*, Jan. 25, 1868; *Washington Weekly Chronicle*, Jan. 25, 1868.

decision from the Supreme Court. Let the bill pass prohibiting a bare majority from declaring any Congressional Act void," said the *Independent*. "It is needed now, never more than at this moment; and the fact that it is needed is no argument against the propriety of passing the bill, as some timid people contend;" and it even charged that: "The Supreme Court is at this hour the guilty confederate of Andrew Johnson. The country will rejoice to see it checkmated." *Harper's Weekly* argued, in support of the measure, that: "If the Court shall decide against the validity of the Legal Tender Act, that the War was fought on an unconstitutional basis, and that the Southern States are still in the Union . . . results that cannot be contemplated without extreme solicitude would follow, and it is wholly unsafe to leave these questions to the decision of a bare majority of the Judges. . . . The regulation in question in no manner interferes with the stability of the Court, except to promote it. It leaves the whole judicial power in the tribunal, and only regulates it so as to prevent a capricious judgment. The independence of the Judge is not interfered with." The *Indianapolis Journal* regretted that the bill had not been introduced at an earlier date, when it would not provoke such partisan feeling; but it said that it was never of so great importance as now. "The Reconstruction Acts are full of the rights and liberties of millions of men; and to have these stricken down, by the decision of some old fossil on the Supreme Bench whose political opinion belongs to a past era, would be an outrage on humanity." It urged that a two-thirds requirement would lift judicial decisions into universal respect, while the present close divisions exposed the Court to imputations of partisanship. The *Washington Chronicle*, urging the passage of the bill,

said that owing to the Court's action in the *McCardle Case*, which had created "a feeling of just and general resentment . . . the new peril of the Republic is grave; but the remedy is sure and drastic, and it ought to be applied without waiting or shrinking."

These views, however, were not shared by the country at large; and the general public was opposed to so revolutionary an attempt to interfere with the Judiciary.[1] A leading paper in the West, the *Chicago Republican*, said that Congress was attempting to override the Supreme Court, the National Executive and every judicial tribunal in the country; that Congress should "check injustice and oppression on its own part." And it further stated that it could never "sit by quietly and see a hand lifted against the Court or the Constitution, whether by our National Congress or by Southern traitors", and that such were the views of nine tenths of the Republicans in the Northwest. "The people are not in favor of this Supreme Court bill. Let Congress avoid all doubtful or violent measures of legislation. . . . It must not meddle with the constitutional rights and privileges of the people, nor of their Executive or Supreme Judiciary. . . . Regarding, as they do, the Supreme Court as the judicial bulwark against tyranny and injustice on the part of either President or Congress, they will never permit this safeguard against oppression to be swept away. The people will be found as prompt to resent usurpation on the part of Congress as of Johnson." Other papers asked if the Republican leaders in Congress wished to justify the charge of the Democracy that they are bound upon usurpation and revolution. The

[1] *Chicago Republican*, Jan. 15, 24, 25, 27, 31; in the latter issue it stated that the *Cincinnati Gazette, Detroit Tribune, Cleveland Herald, Albany Evening Journal*, and fifty other Republican papers were opposed to the bill. See also *Nation*, Jan. 16, 30, Feb. 20, 1868; *Springfield Republican*, Jan. 13, 18, 25, Feb. 1, 1868.

Springfield Republican remarked sarcastically, but pertinently: "If the Supreme Court should decide the two-thirds law to be unconstitutional, and by a two-thirds vote, what is to be done next? This is a poser. There seems to be nothing for it but to suspend the action of the Court on constitutional questions, during the existence of the present Congress." The *Nation* opposed the bill as an attempt by Congress to manipulate the Court to suit a particular exigency, the only effect of which would be to weaken the Court's influence. Pointing out that, hitherto, the opponents of the Court had been found among the partisans of State-Rights, it said that: "It is more than strange, it is pitiable, to find the National men of the present day repeating the State arguments so often used by their adversaries. To remove the legislation of Congress from the reach of all jurisdiction is simply impossible. . . . If the Judges of the Nation are silenced, those of the States will be left entirely uncontrolled. . . . Remove the supervisory function of the National Judiciary and these laws will become the sport of local partisanship; upheld in one commonwealth, they will be overthrown in another, and all compulsive character will be lost. . . . To restrict their jurisdiction and weaken their moral power is, therefore, to sacrifice in a most unnecessary manner that department of the Government which, more than any other, will make National ideas triumphant, not only in the legislation of today but in the permanent convictions of the people."

Gideon Welles displayed his apprehensions as a conservative Republican over this attitude of the Radicals as follows:

Jan. 13, 1868: In the House, under the discipline and stimulation of the Radical leaders, there is manifested a revolutionary and violent spirit. Part of the conspiracy

is a scheme to change the character of the Supreme Court, which Stevens and his fellows find is against them.

Feb. 18, 1868: In their war upon the Court, the Radicals under the lead of Trumbull, have under consideration an act prohibiting the Court from passing judgment on political questions, and they have now a bill declaring what are political questions. These usurpations and intrigues strain our government.

In the Senate, there now appeared some hesitation on the part of the Republican leaders to enact the House bill for the requirement of a concurrence of two thirds of the Judges; and Democratic Senators made the charge (with considerable reason) that the Republicans suspected that, even with such a requirement, the Reconstruction Laws would be held unconstitutional. After several postponements, the bill was finally dropped. Later, another more extreme measure, originating with Thaddeus Stevens in the House and expressly forbidding the Supreme Court to take jurisdiction in any case in law or equity arising out of the Reconstruction Acts, was introduced by Lyman Trumbull in the Senate; but that body, doubting the political expediency of creating such a precedent, finally took no action.[1] The wisdom of this course was well pointed out by the *Nation:* "If this game of 'exceptions', as an instrument of party warfare, be once fairly entered on, we venture to say that, in the course of the next twenty years, the constitutionality of half the statutes at large would be withdrawn from the cognizance of the Supreme Court. It is, luckily, three years before the Democrats can get the upper hand in

[1] *40th Cong., 2d Sess.*, 2127, March 26, 1868. It is to be noted that are solution was introduced into the House to investigate a statement appearing in the *Washington Evening Express* of Jan. 29, 1868, to the effect that Judge Field had openly declared the Reconstruction law to be invalid. *Chicago Republican*, Feb. 6, 7, 1868. These statements were later proved false.

Congress; but when they do, there will be some wonder-working legislation."

On February 10, 1868, the Court made public for the first time its full opinion (delivered by Judge Nelson) in the cases brought by the States of Georgia and Mississippi against Secretary Stanton and General Grant, which it had dismissed in the preceding May. The first sentiment of the Republicans as to this opinion was that it would dispose of the *McCardle Case*,[1] which they assumed would also be regarded by the Court as involving a mere political question. "Not only is the supremacy of the Court declared to be judicial supremacy, but the issues arising out of the Reconstruction legislation of Congress are pronounced to fall within the political domain, upon which the tribunal has no right to enter. In vain will ex-rebels look to the judicial department of the United States to aid them in their wicked scheme of insubordination and resistance," was the exultant comment of the *Chicago Tribune;* and the *Chicago Republican*, remarking the unanimity of the Judges, said that: "It must exert a powerful influence in repressing the stubbornness and confidence of the ex-rebels in their reactionary schemes. They must now feel that Congress is sole master of the political situation. . . . Disregard of the distinctions between political and judicial powers would convert the Supreme Court into a political council and board of control. . . . It would confer on the Supreme Court, powers too gigantic and terrific, too dangerous to the peace of the United States." On the other hand, the *Nation* correctly pointed out that: "The judgment is mainly important, as showing the reluctance of the whole Court to meddle in Reconstruction, or in any way

[1] *Chicago Tribune*, Feb. 12, 1868; *Chicago Republican*, Feb. 11, 12, 1868; *Nation*, Feb. 13, 1868; *Springfield Republican*, Feb. 12, 22, 1868.

throw itself across the track of Congress or of the Executive, and ought to make some of the 'sons of thunder' who have been abusing it for the last month a little ashamed of their work. But it does not, it seems to us, remove all grounds for anxiety as to the *McCardle Case;* for Judge Nelson in several places suggests the inference that a bill showing that the Act of Congress in some way infringed on rights of persons or property might be differently treated."

On February 3, 1868, one week after the publication of its opinion in the Georgia and Mississippi cases, and only one week after the argument of *Ex parte McCardle*, 6 Wall. 318, the Court, contrary to general public expectation, rendered its decision upholding its jurisdiction of the latter case, and on March 2, arguments were begun before it. "I spoke two and a half hours today, and as well as I expected or hoped to do," wrote Senator Mathew Hale Carpenter (one of the Government counsel) to his wife. "I am praised nearly to death. I had half of the Senate for an audience. Miller's face was as the face of an angel, radiant with light and joy. Davis and Field looked troubled. Nelson, Clifford and Grier, dead against me. But I shook them up and rattled their dry bones." [1] Meanwhile, the Impeachment Trial of President Johnson had been initiated and on March 5, in the midst of the McCardle argument, Chief Justice Chase was withdrawn from the Bench in order to preside over the Senate.[2] On March 9, the Court took the case under advisement.[3] Three days later, Con-

[1] *Mathew Hale Carpenter as a Lawyer*, by Henry D. Ashley, *Green Bag* (1894), VI: "When Carpenter finished, Secretary of War Stanton, with tears in his eyes, exclaimed fervently: 'Carpenter, you have saved us.'"

[2] The House had voted for impeachment, Feb. 24, 1868; the first proceedings in the Senate took place on March 5; the trial began March 13, and the first vote was taken May 16.

[3] As to this case, see especially *New York Herald*, March 4, 14, 1868, publishing

gress finally decided to intervene and to render any decision of the case impossible. In spite of the fact that, owing to Chase's absence, the Court might be desirous of postponing a decision until the next Term, the Radicals in Congress were fearful and resolved to take no chances. On March 12, 1868, there was pending in the House a harmless and unimportant Senate bill to extend to the Court's appellate jurisdiction in cases involving customs and revenue officers. Unanimous consent had been obtained by Robert C. Schenck of Ohio for its consideration, on the statement that it was a mere routine matter; and while the Democrats were thus thrown off their guard by this assertion, James F. Wilson of Iowa, without any explanation or debate, introduced an amendment entirely repealing the appellate jurisdiction of the Court under the Habeas Corpus Act of 1867, and further prohibiting the exercise of any jurisdiction by the Court on appeals which had been or might be taken.[1] The amendment was agreed to without comment or objection, and the bill as thus amended by the House went back to the Senate. Then, for the first time, the moderate Republicans and the Democrats awoke to the fact that they had been deceived. Benjamin M. Boyer of Pennsylvania charged that the House had been disarmed by Schenck's remarks and induced to accept an amendment not genuine. He charged that it had

David Dudley Field's argument in full; *Chicago Republican*, March 5, 6, 7, 10, 1868; *Indianapolis Journal*, March 6, 10, 1868. The *Springfield Republican's* Washington correspondent wrote, March 5, that it was considered certain that the case would not be decided until the next Term.

[1] In *Social Forces in American History* (1911), by A. M. Simons, 300–301, it is stated: "On the 27th of March, 1868, Congress passed a law threatening the members of the Supreme Court with fines and imprisonment, if they interfered with the carrying out of such legislation, and notifying that body that this legislation was not subject to review as to its constitutionality. The Court and Congress completely punctured the bubble upon which the autocratic power of the Court rests." Such a statement as to the character of the statute enacted is incorrect, for it made no provision for fines and imprisonment.

been smuggled through, to prevent a test of the constitutionality of the Reconstruction Acts; and while admitting that the minority had not been wide enough awake, and had been caught napping, he thought that it would have been more manly to have introduced such a measure for free discussion.[1] Schenck, in reply, boldly and frankly avowed that his purpose had been to deprive the Court of its power and jurisdiction, saying that he had lost confidence in the majority of that tribunal, and that: "They usurp power, whenever they dare to undertake to settle questions, purely political, in regard to the status of the States and the manner in which those States are to be held subject to the law-making power. And if I find them abusing that power, by attempting to arrogate to themselves jurisdiction under any statute that happens to be upon the record from which they claim to derive that jurisdiction, and I can take it away from them by a repeal of that statute, I will do it. . . . Now I hold that the Supreme Court, arrogating to themselves the pretension to settle not merely judicial but political questions, and trampling upon the principle of the decision made in the case of the Dorr Rebellion and upon every other decision of that kind, are, the majority of them, proceeding step by step to the usurpation of jurisdiction which does not belong to them. And I hold it to be not only my right, but my duty as a Representative of the people, to clip the wings of that Court."

In the Senate, the amendment to its bill was concurred in, with no explanation or debate, on March 12, 1868, by a vote of thirty-two to six, with sixteen Senators absent. A request by Charles R. Buckalew of Pennsylvania for information as to the purpose of the amendment received only a very brief reply by George

[1] *40th Cong., 2d Sess.*, 1859, 1881 *et seq.*, March 12, 14, 1868.

H. Williams of Oregon, which did not in any way explain its real purpose; and a request by Buckalew for postponement of action was refused.[1] Within a very few days, however, after the passage of the bill through both Houses, the fact that Congress had been practically tricked into passing, without debate, a measure of the utmost importance burst with a shock upon the country. Welles wrote in his diary:

March 14, 1868. It is evident that the Radicals in Congress are in a conspiracy to overthrow not only the President but the Government. The impeachment is but a single act in the drama. . . . By trick, imposition and breach of courtesy, an Act was slipped through both houses, repealing the laws of 1867 and 1789, the effect of which is to take from the Supreme Court certain powers and which is designed to prevent a decision in the *McCardle Case.* Should the Court in that case, as it is supposed they will, pronounce the Reconstruction Laws unconstitutional, the military governments will fall and the whole Radical fabric will tumble with it. Only one course can prolong the miserable contrivance, and that is a President like Wade, who will maintain the military governments regardless of Courts, of law, or right. Hence, I have very little expectation that the President will escape conviction. His deposition is a party necessity, and the Senators have not individually the strength, ability, nor honesty, to resist the Radical caucus decision, which Stevens, Ben Butler, and other chief conspirators sent out.

"The country is in the hands of Congress. That Congress is the Radical majority, and that Radical majority is old Thad Stevens. Government by the people has its glories!" said the *New York Herald*, with sarcasm, but with truth.[2] But the Radical Republican press was exultant. "The passage of that little

[1] *40th Cong., 2d Sess.*, 2095, March 25, 1868; see speech of Senator Thomas A. Hendricks explaining the method by which the bill passed the Senate.

[2] *New York Herald*, March 14, 1868; *Independent*, March 19, April 21, 1868; *Springfield Republican*, March 27, 1868.

bill which put a knife to the throat of the *McCardle Case* was a splendid performance. . . . Congress will not abandon its Reconstruction policy to please any Court, because it sincerely believes that the welfare of the Nation depends upon the success of that policy," said the *Independent*. "This Congress will not brook opposition from the Court in political matters. The safety of the Nation demands that Congressional Reconstruction shall be successful; and if the Court interferes, the Court will go to the wall. This language sounds harsh and indecorous to fossil ears, no doubt." And the *Springfield Republican* said: "Congress does not intend to permit the Supreme Court to overthrow it or revive rebellion, if it can help it."

Although his impeachment trial had already begun, the President did not hesitate, even at this desperate moment in his career, to meet the Congressional attack upon the Court with a vigorous determination to uphold the honorable status of that tribunal; and on March 25, he sent to Congress a powerfully worded veto of the bill, in which he stated:

> Thus far during the existence of the Government, the Supreme Court of the United States has been viewed by the people as the true expounder of their Constitution, and in the most violent party conflicts, its judgments and decrees have always been sought and deferred to with confidence and respect. In public estimation, it combines judicial wisdom and impartiality in a greater degree than any other authority known to the Constitution; and any act which may be construed into, or mistaken for, an attempt to prevent or evade its decisions on a question which affects the liberty of the citizens and agitates the country cannot fail to be attended with unpropitious consequences. It will be justly held by a large portion of the people as an admission of the unconstitutionality of the act on which its judgment may be forbidden or forestalled, and may interfere with that willing acquiescence in its provisions which

is necessary for the harmonious and efficient execution of any law.

When the question of passing the bill over the veto arose in the Senate, opportunity was at last given for a thorough debate as to its purpose, and its supporters were worsted on the argument.[1] Lyman Trumbull, who was largely responsible for its enactment, attempted to argue that there was no case pending before the Supreme Court under the Habeas Corpus Act of February 5, 1867. This bill, he said, was not a very important measure; and at all events the "liberties of the people had been pretty well preserved for three quarters of a century, without the Act of 1867 in any of its provisions; and all the securities that were ever afforded until within the last year are left just as they always have been." [2] To this rather disingenuous argument, James R. Doolittle of Wisconsin replied very forcibly that, if there was no case pending before the Supreme Court which would be affected by the bill, why did the bill make specific provisions for repeal of jurisdiction in all pending cases? "Why undertake to take away the jurisdiction of the Court? The truth is, and we may as well look it square in the face, it is because men know that these acts will be decided to be unconstitutional. . . . I say it is because they fear it; because they know that the constitutionality of the measures is in-

[1] *40th Cong., 2d Sess.*, 2095, 2115, 2127, 2165, March 25, 26, 1868.

[2] The *Chicago Republican*, March 27, 1868, attempted a similar and false-hearted defense of the bill, saying that the Habeas Corpus Act of 1867 was only intended "to counteract the spirit of rebel persecution that sought to inflict vengeance upon Union whites and blacks under the forms of law" and that "probably, through the expensiveness of its processes, it had been little resorted to. Indeed the ingenuity of disloyal men threatens to make it an instrument for promoting their nefarious ends. Congress has, therefore, decided to remove from them this source of embroilment. Another reason justifying its repeal is that the whole time of the Supreme Court is already occupied in its consideration of cases naturally and properly arising, and that it would be impolitic to encumber the docket with unnecessary causes."

volved, and they fear that the decision will be against their constitutionality." Trumbull's position in regard to this bill was a delicate one, for he was counsel for the Government in the *McCardle Case* and had full knowledge of the issues involved. William M. Stewart of Nevada, therefore, came to his aid with a vicious attack upon the Court and its motives. Stewart was no more fortunate, however, in the explanation which he proffered as to the necessity for this bill; since, after stating that it was required because of the crowd of cases arising under the Act of 1867, he was obliged to admit, on being pressed for details, that he knew of only one pending case — McCardle's. In a masterly speech on the whole subject of habeas corpus, Senator Thomas A. Hendricks of Indiana taunted the "brave Senators" who were "afraid of the decision of the Court. . . . You did claim to the country that the Administration of Mr. Lincoln was entitled to its confidence; and are there not five Judges out of eight whom Mr. Lincoln appointed and whom you confirmed; and at the head is there not Chief Justice Chase, distinguished as a party leader? Then, with a Supreme Court, five out of eight appointed by Mr. Lincoln and confirmed by these honorable Senators that I am addressing, and only three of the Old Court left, you say you cannot afford to risk this question before that Court. Why? Let that question be answered." Senator Reverdy Johnson also replied with force to Stewart's attacks on the Court, and said that it was "dangerous to inculcate the belief that Courts can be governed by political and party motives." Senator Willard Saulsbury of Delaware charged that the passage of the bill was an act of "despotism"; Senator Thomas F. Bayard of Delaware termed it a "confession of fear"; and Senator Charles R. Buckalew of

Pennsylvania spoke of Trumbull's "feeble and fruitless denial" of the real purpose of the Act. But though the merits of the debate were wholly with the defenders of the Court, the bill passed the Senate on March 26, 1868, over the President's veto, by a vote of thirty-three to nine (with twelve Senators absent); it passed the House on March 27, by a vote of one hundred and fifteen to fifty-seven, and became the Act of March 27, 1868. Thus was consummated an action which has been, with justice, characterized as "an abominable subterfuge on the part of Congress and a shameful abuse of its powers." [1]

Meanwhile, during the eighteen days between the close of the argument in the *McCardle Case* and the final passage of this bill, there was much excitement over the question whether the Court would proceed to render its decision, regardless of the pendency of the bill taking away its jurisdiction.[2] Gradually, it became apparent that the Court intended to await the final outcome of the bill, and, as the Republican papers stated, that it did not choose "to run a race with Congress", since "it would hardly have been consistent with the dignity of the country and the respect due to the other branches of the Government to proceed with the matter until the President had either approved or vetoed the bill, and the Congress had acted on the veto." [3] "The Supreme Court, acting with

[1] *Reconstruction and the Constitution* (1902), by John W. Burgess, 196–197.

[2] The *Boston Post's* Washington correspondent wrote that it was believed that the Court would decide the case, "in defense of its own dignity, and to show that the Court cannot be trifled with by reckless partisans who flippantly speak of 'clipping the wings of the Court.' It is well ascertained that Justices Chase, Nelson, Grier, Clifford, Davis and Field believe the Reconstruction Acts to be unconstitutional. . . . The decision is made up, and they have the power and the right to deliver it. Whether they have the nerve to be an independent Judiciary remains to be seen." See *New York Tribune*, March 19, 1868.

[3] The *Indianapolis Journal*, March 18, 1868, said: "The Copperheads contend that so far as the *McCardle Case* is concerned, having already been argued before

more discretion and better taste than the President," said the *Springfield Republican*, "bows down to the will of Congress, and has postponed the *McCardle Case* till Congress has more definitely settled the Reconstruction question. No announcement to this effect has been publicly made, but it is known that the Court has made the decision, only Justices Field and Grier voting for an immediate decision." This delay by the Court was the subject of much criticism by the Democrats, who asserted that it was seeking to evade its responsibilities. When the bill was finally passed over the President's veto, the Court was immediately confronted with the necessity of deciding whether Congress had the power to abolish its right to adjudicate pending cases. On Monday, March 30, Jeremiah S. Black moved that the case be set down for argument on this important question, and the Court after some hesitation agreed to hear it on April 2. Counsel, however, not being prepared to proceed on so short a notice, a majority of the Judges (Grier and Field dissenting) decided that no further date would be fixed and that the whole matter must be postponed until the next Term, and it was so ordered. At the same time, the Court refused to take up the pending case of *Georgia* v. *Grant*, a new bill in equity filed by the State to enjoin the enforcement of military action.[1]

the Court, the bill is *ex post facto* and cannot apply." The *Chicago Republican*, April 7, 1868, said that the case was not considered at the first consultation day, Saturday, March 13, and that before the next one, the Court had learned of the passage of the bill on March 12; see also *Indianapolis Journal*, April 7, 1868; *New York Herald*, March 20, 1868; *Springfield Republican*, March 28, 1868; speech of Reverdy Johnson, *40th Cong., 2d Sess.*, 2095. The *Chicago Republican*, March 24, 1868, said: "The Democrats are abusing the Supreme Court soundly for not rendering decision, since the announcement is made, on authority of the Court, that a decision will not be made for some time."

[1] *Indianapolis Journal*, March 28, 1868. In this case, on Feb. 8, 1868, David D. Field moved for leave to file a new bill in equity; leave was granted March 16; see also *New York Tribune*, March 21, 28, 1868.

The Reconstruction cases were thus disposed of, for another year. But the revolutionary methods which had been employed by Congress in accomplishing its purpose and the evident reluctance of the Court to face the issue dismayed and disheartened the conservative portion of the community. So strongly did Judge Grier feel over the postponement of the *McCardle Case* that, on conclusion of Black's argument on March 30, he filed in writing the following stout protest:[1]

> This case was fully argued in the beginning of this month. It is a case which involves the liberty and rights, not only of the appellant, but of millions of our fellow citizens. The country and the parties had a right to expect that it would receive the immediate and solemn attention of the Court. By the postponement of this case, we shall subject ourselves, whether justly or unjustly, to the imputation that we have evaded the performance of a duty imposed on us by the Constitution, and waited for Legislative interposition to supersede our action, and relieve us from responsibility. I am not willing to be a partaker of the eulogy or opprobrium that may follow. I can only say,
>
> *Pudet hoc opprobrium nobis*
> *Et potuisse dici et non potuisse repelli.*
>
> or, literally translated, I am ashamed that such opprobrium should be cast upon the Court, and that it cannot be refuted.

This action by Grier was made the subject of considerable comment, and extreme Republican papers termed it "an unseemly exhibition . . . a breach of judicial decorum, for which there is no excuse unless it was caused by aberration of mind or dotage, . . . an extra-judicial opinion of an extraordinary character tantamount to accusing his Associates on the Bench

[1] *Indianapolis Journal*, April 2, 3, 1868; *Chicago Republican*, April 3, 1868; *National Intelligencer*, March 31, April 6, 1868. Grier's statement is reported in slightly differing phraseology in the various papers.

of malversation in office." There was, nevertheless, a very general feeling throughout the country that the Court had evaded an issue. "It must be confessed," said the *Springfield Republican*, "that the course of the Supreme Court has not been creditable to that body as the embodiment of the highest judicial authority of the Nation. Justice Grier seems to have been especially sensitive to the unfavorable effect the action of the Court in postponing the decision would have on its reputation and influence, and when the case was called, read a brief document, strongly phrased, expressing his sense of the shame and dishonor which the Court had incurred. He had held no counsel with his Associates, and his action took both them and the public by surprise, and still causes much excited comment at Washington." Benjamin R. Curtis wrote that: "Congress, with the acquiescence of the country, has subdued the Supreme Court, as well as the President." And Welles in his diary took a despairing view of the situation:

March 20, 1868. The Judges of the Supreme Court have caved in, fallen through, failed in the *McCardle Case.* Only Grier and Field have held out like men, patriots, Judges of nerve and honest independence. These things look ominous and sadden me. I fear for my country when I see such abasement. Fear of the usurping Radicals in Congress has intimidated some of these Judges, or like reckless Democratic leaders, they are willing their party should triumph through Radical folly and wickedness. These are indeed evil times! Seward has on more than one occasion declared that he controlled Judge Nelson. Whether he is, or has been, intriguing in the matter, or taken any part is a problem. The action of Congress, and particularly the Senate in taking from the Supreme Court certain powers to prevent a decision in the *McCardle Case* is shameful, and forebodes an unhappy future to the country. There is no exercise of reason, judgment, intelligence or patriotism by

the Radical majority on any subject whereby their party is affected. Truth, justice, right, law and Constitution are broken down and trampled under foot by Senators. I say this in sorrow.

The *National Intelligencer* said that Grier's protest was rendered "with a manifestation of much emotion", and that it was an "everlasting memorial" to his honor. "Well does he anticipate the inevitable imputation of weak evasion of a duty, whose obligation is inexorable in proportion to the peril threatened by its performance."

While there was some justification for the view that the Court had not been firm in its stand, it must be admitted that, in view of the fact that the Chief Justice was presiding in the Impeachment Trial of the President, it was probably wiser on the part of the Court to postpone arguments on so important an issue until there should be a full Court; and the intimations that its action was influenced by the political situation were clearly unfair, in view of its previous courageous action in sustaining its jurisdiction over the case.[1] That the Court could not escape the issue presented to it by Congress had been shown, four days before its adjournment, when an original petition for habeas corpus was presented to it, in a case arising in Florida where two men were held by the military for the murder of a negro. This case would inevitably require a decision on the Reconstruction Laws, at the next Term.[2]

[1] Chief Justice Chase wrote his views in a letter in September, 1868, as follows: "I hold my old faith in universal suffrage, in Reconstruction upon that basis, in universal amnesty, and in inviolate public faith; but I do not believe in military government for American States, nor in military commissions for the trial of American citizens, nor in the subversion of the Executive and Judicial Departments of the General Government by Congress." *Green Bag* (1902), XIV.

[2] This case (not reported) of *Ex parte Martin and Gilly*, in which a writ was granted, returnable at the December, 1869, Term, seems not to have been pressed; for references to it, see *Chicago Republican*, March 28, 1868; *Indianapolis Journal*, March 28, April 1, 1868; *National Intelligencer*, March 31, 1868.

With the passage of the Act of March 27, 1868, Congress reached the limit of its attacks upon the Court. A reaction in favor and support of that tribunal at once arose. The acquittal of President Johnson, in May, 1868, broke the power of the Radicals. Both Congress and the country at large acquired a cooler and saner point of view. Many of the Southern States, reluctantly accepting Reconstruction as an ineluctable fact, ratified the Fourteenth Amendment and were readmitted to participate in the Government. And finally, in the spring of 1869, several decisions of the Court itself seemed to give assurance that there would be no judicial overthrow of Congressional plans.

Encouragement appeared to be first afforded when the Court dismissed from its docket the indictment of Jefferson Davis for treason. For four years, the question whether the Southern participants in the Civil War were guilty of treason had been involved in this case, and had never been decided authoritatively in any other case in the Federal Courts. Davis had been captured on May 10, 1865, and had been indicted in the District of Columbia, and later in the United States District Court in Virginia; but as it had been generally felt that a trial "in the hotbed of treason by a jury of sympathizing traitors would be a transparent farce",[1] he had been kept by the military authorities in Fortress Monroe. Finally, on October 12, 1866, Attorney-General Stanbery advised his transfer to the civil authorities; on refusal of compliance by the military, his transfer was ordered by the District Court on a

[1] *Philadelphia Inquirer*, May 12, 1866; see especially *ibid.*, April 10, May 17, June 8, 13, 1866, May 8, 11, 13, 15, 1867, for full account of the various proceedings; see also *Cleveland Herald*, May, 1867, *passim*. See *Notes* of Col. W. G. Moore, Private Secretary to President Johnson, in *Amer. Hist. Rev.* (1913), XIX, giving account of a Cabinet Meeting of May 7, 1867, at which the President ordered the War Department to turn Davis over to the civil authorities.

writ of habeas corpus, May 12, 1867, and he was released on bail. While the Radical Republicans were confident that all "Rebels" were traitors, there had been grave doubts expressed by many at the North (including most of the Bar) whether a military officer of the Confederate Government could legally be held to be guilty of treason. Many others, like Horace Greeley, had believed it to be bad policy to press the point, and had advocated the release of Davis.[1] Many, however, had urged that the trial should be pressed in order that the question of law might be finally decided. "The trial of Mr. Davis, if it can be conducted in a satisfactory manner, will have some important and beneficial results. An honest jury cannot fail to find the prisoner guilty, as far as the mere facts are concerned," said the *Nation* in 1867. "The real controversy will be before the Court, to determine whether those facts constitute treason. No authoritative decision has yet been rendered upon that question. The only convictions for treason against the United States, so far as we are aware, took place in California and Kentucky before the United States District Courts. . . . The Kentucky convict was a citizen of Kentucky and could only have made his case worse by justifying under the authority of Tennessee and a seceded and foreign State. The California party was made up of nondescripts from various Nations and States, all of them residents of California and therefore clearly without excuse for hostile acts. But no Court has yet had an opportunity to determine whether the commander of

[1] To Greeley, Chief Justice Chase wrote, June 26, 1867, advising him to read Webster's reply to Hayne, and saying: "You will find no hint that nullifiers, pursuing their nullification to civil war, ceased to be traitors, on becoming engaged in such a war."

The *American Law Review* (Jan., 1867), I, 387, said that "the continued postponement of the trial of this State prisoner has been the subject of bitter altercation."

a regular army, conducting war against the United States upon equal terms and in the name of a hostile government, can be convicted of treason." [1]

Owing to the unwillingness of Chief Justice Chase to hold Court in Virginia while the military authorities were in control, and to many other reasons, the trial did not occur until December 3, 1868. By that time, the war passion against Davis had died down; the interest in the law of treason had dissipated; and the adoption of the Fourteenth Amendment had given rise to another question in the case, namely, whether the provision for disqualification for office established by the third clause of that Amendment was intended to exclude any other form of punishment for the acts to which it referred. Chief Justice Chase and District Judge Underwood, sitting in the District Court, had differed in opinion on this latter new question of law, and the case had accordingly been certified to the Supreme Court, December 5, 1868. Finally, on February 19, 1869, the Government not wishing to press the case further, it was dismissed from the docket — a disposition of the affair which commended itself to the Bar and to the general public; "and so a ridiculous farce ends," said *Harper's Weekly*.[2]

Soon after the end of the *Davis Case*, the *McCardle Case* was reached for final argument, on March 19, 1869, on the question of the power of Congress to prohibit the Court from deciding a pending case; and on April 12, the Court rendered a unanimous decision that the statute had taken away its jurisdiction, and that therefore it could not proceed to pronounce judgment.

[1] *Nation*, May 10, 1867.

[2] The certificate of division was filed in the Supreme Court, Dec. 7, 1868; *Trial of Jefferson Davis*, by David K. Watson, *Yale Law Journal* (1915), XXIV; *Harper's Weekly*, Jan. 30, 1869; *Amer. Law Rev.* (Jan., 1869), III, 368; *Springfield Weekly Republican*, Nov. 28, Dec. 26, 1868, Jan. 2, 1869.

"Judicial duty," said the Chief Justice, "is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer." While appellate jurisdiction of the Supreme Court, he held, was not derived from Acts of Congress but from the Constitution, yet it was conferred "with such exceptions and under such regulations as Congress shall make." Congress had chosen to make a specific and positive exception in this case; and the Court was "not at liberty to inquire into the motives of the Legislature." *Ex parte McCardle*, 7 Wall. 506. On the same day, the Court rendered an opinion in a most important case involving the status of the seceding States, — *Texas* v. *White*, 7 Wall. 700; and while it did not actually decide the question of the validity of the Reconstruction Laws, its general language gave much encouragement to their supporters. In this case, the State of Texas, through its Governor, brought an original suit in equity to enjoin the payment of certain State bonds owned by the State prior to the war and negotiated by the Confederate State Government. The first question presented to the Court was: "Is Texas a State of the Union, and as such, capable of bringing suit?" It was contended by the defendants that Texas, having seceded and not yet being represented by Senators and Representatives in Congress, was still out of the Union. This was the position which Thaddeus Stevens and other Radicals had taken in Congress. It was also contended that a Governor elected before the passage of the Reconstruction Acts was illegally elected and incapable of authorizing suit. The Court, by Chief Justice Chase, held that it was unnecessary to inquire into or pronounce judgment upon "the constitutionality of this legislation so far as it relates to military authority or to the

paramount authority of Congress"; that the ordinance of secession by Texas was a nullity; that Texas had always remained a State of the Union within the purview of the Constitution, which, in the memorable words of Chase, "in all its provisions looks to an indestructible Union, composed of indestructible States. When, therefore, Texas became one of the United States, she entered into an indissoluble relation." While her obligations to the Union remained the same, her relations after secession changed, and "these new relations imposed new duties upon the United States. The first was that of suppressing the rebellion. The next was that of reëstablishing the broken relation of the State with the Nation." This duty Congress had the power and the duty to perform, under the provision of the Constitution guaranteeing to the States a republican form of Government. But as the President had appointed a provisional Government, which was in actual operation when Congress passed its Reconstruction Acts, and which had authorized this suit, the Court held that the suit was instituted by a competent authority and by a State of the Union. As to the right of the bondholders in the case, the Court held that it must be determined by the purposes for which the bonds were negotiated; that while Texas was legally always a State of the Union, it did not follow that all her actions and laws, while in fact a member of the Confederacy, were to be held valid; and that statutes which were "necessary to peace and good order among citizens" might be valid, but that those passed in furtherance or support of the rebellion, were to be regarded as absolutely void.[1]

[1] The case was argued by George W. Paschal and R. T. Merrick against James Hughes, Albert Pike, Robert W. Johnson, J. M. Carlisle, P. Phillips, S. S. Cox and J. W. Moore. See *The Case of Texas* v. *White*, by William W. Pierson, *Southwestern Hist. Quart.* (1915), XVIII, XIX.

This decision has constituted one of the landmarks in American history. It settled forever the question whether a State could legally secede, and it confirmed the permanence of the Union. Nevertheless, it has frequently been considered logically unsatisfactory in its reasoning; and the dissenting opinion of Judges Grier (concurred in by Swayne and Miller) seems more easily to be supported, when he said that the status of Texas was "to be decided as a political fact, not as a legal fiction. . . . If I regard the truth of history for the last eight years, I cannot discover the State of Texas as one of these United States. . . . I am not disposed to join in any essay to prove Texas to be a State of the Union when Congress have decided that she is not. . . . Politically, Texas is not a State in this Union. Whether rightfully out of it or not is a question not before the Court." The decision came, however, as a welcome solution to a greatly vexed and debated question; and Chase's opinion, though adverse to the extreme claims of Thaddeus Stevens and the Radicals, who deemed the seceding States entirely out of the Union and properly subject to any legislation Congress chose to enact, was equally adverse to the claim of the Democrats, who held that Congress had no power whatever to withhold from these States any of the rights which they had possessed before the war. The general views and plans of the more moderate Reconstruction statesmen were in complete consonance with the language of the opinion; and the growing fears lest the Court would interfere with their plans were thus allayed. An able opinion rendered by Attorney-General Hoar, following the decision of *Texas* v. *White* and sustaining the legality of military trials in Texas, gave further comfort to the Reconstructionists. "The Act of March 2, 1867, is, in my opinion," said Hoar, "a legislative declaration

that in Texas the war which sprang from the rebellion is not to all intents and purposes ended;" and he held that other statutory legislation and judicial declarations recognizing the end of the war were "not inconsistent with the proposition that, for some purposes, the rights of war are not ended." [1]

In spite of these judicial decisions, and in spite of the action of Congress in abolishing the Court's appellate jurisdiction in habeas corpus proceedings instituted under the Act of 1867, it appeared in the fall of 1869 that there was still a possibility that the Court might be required to render a decision on the legality of the Reconstruction Laws. On October 15, 1869, the case of *Ex parte Yerger*, 8 Wall. 85, was brought up for argument by Philip Phillips and J. M. Carlisle against Attorney-General Ebenezer R. Hoar. This suit was a petition for habeas corpus originally made to a Federal Circuit Court in Mississippi by another editor, who had been imprisoned by the military, but who on denial of his writ had taken an appeal to the Supreme Court, under the provisions of the original Judiciary Act of 1789, and not under the repealed Act of 1867.

One week after the argument, the Court, through the Chief Justice, rendered a decision exhaustively reviewing the Court's powers under the various habeas corpus statutes, and upholding its jurisdiction of this appeal, under the old Act of 1789. By this unexpected ruling, the road was left open for a full argument of the whole question of the Reconstruction legislation, when the case should be reached for hearing on the merits. With such a situation confronting them, the Radicals in Congress determined upon their most radical move against the Judiciary. On December 9,

[1] See *Amer. Law Rev.* (Dec., 1869), IV, opinion of Hoar to the Secretary of War, in *Weaver's Case*, May 31, 1869.

1869, Senator Trumbull reported a bill which was entitled "to define the jurisdiction of the Supreme Court in certain cases", but which was in reality a bill to destroy the constitutional function of the Court — a bill which was aptly termed the "bright, consummate flower of the military doctrine." [1] It declared that no civil government existed in Virginia, Mississippi and Texas and that none should be recognized by the Executive or by the Judiciary until Congress should decide; it further declared that the Reconstruction Laws were "political in their character, the propriety or validity of which no judicial tribunal was competent to question", and it prohibited the Supreme Court "from entertaining jurisdiction of any case growing out of the execution of said Acts"; and it suspended all appeals growing out of such execution, either in habeas corpus cases or otherwise.

While this bill was welcomed by the Radical Republicans, conservative men of both parties felt that the proposed action was far too extreme. One of the leading Western Republican papers, expressing its opposition and regret at this renewal of attack on the Court, stated that Congress had "no power to arbitrarily and conclusively decide what issues the National Judiciary cannot take into consideration", and that the Court must possess the power to determine what questions are political merely, and what questions involve per-

[1] *New York World*, Dec. 10, 11, 1869. Section 1 of this bill provided that: "Under the Constitution, the judicial power of the United States does not embrace political power, or give to the judicial tribunals any authority to question the decisions of the political departments of the Government on political questions; and it is hereby declared that all Courts of the United States in the administration of justice shall be bound by the decisions of the political departments of the Government on political questions." Section 2 provided that: "It rests with Congress to decide what Government is the established one in a State, and that it is hereby, in accordance with former legislation, declared that no civil State Government exists in Virginia, Mississippi, or Texas." *41st Cong., 2d Sess.*, 167 *et seq.*, speech of Trumbull, Dec. 16, 1869.

sonal rights and liberties. The power of the Courts to decide the question of constitutionality "arises out of the circumstances of the necessity to decide which of two laws shall prevail." And it concluded with this striking praise of the Court: "If this country possesses an able, experienced, conscientious and universally satisfactory Bench, it is to be found in our Supreme Court. It makes its decisions under the eyes of the whole legal fraternity. If a conspicuous error should be committed, it could not escape detection; and the exposure, through the press of the country, would be entirely equal to the error committed. As yet, no one has presumed to question the purity of the motives which have obtained hitherto in the adjudication of mooted questions." [1] The *New York World* said: "If Congress can force the judicial power to yield to it, the Constitution is annulled; if it is in the power of Congress to say that any law of the United States can be made, into whose constitutional validity, when a case arising under it has taken a judicial form, the judicial power shall not inquire, then Congress is above the Constitution, and all its restraints, prohibitions and injunctions are so much waste paper. . . . The design is to emancipate Congress from all constitutional restraints which arise under any power that Congress chooses to assert is political in character." And the *Nation* asked: "If a majority of Congress is sure not to do wrong, why have any Constitution at all? Why restrain this body of sages by any restrictions whatever? Why not let them make their own Constitution, every session? Indeed, why administer any oath of office?" And it said further that there existed no

[1] *Chicago Republican*, Dec. 11, 1869; *ibid.*, Dec. 15, said that: "Trumbull's bill will hardly become law in its present form. It does not meet with much favor, but it may increase in popularity." *New York World*, Jan. 9, 1870.

need of such a measure to check any supposed tendency of the Court to usurp Congressional power; that the dangers of this, "feared by our democratic fathers, have proved not to have a particle of foundation. Indeed the Judiciary is the branch of the Government and the only one which has been steadily declining in influence and authority during the last fifty years. Nearly every tendency of the day has told against the increase of its power, while there is hardly one which has not helped to increase the power of the Executive and the Legislature."

But there were Senators who desired to go even further than Trumbull, and on December 13, Senator Charles D. Drake of Missouri delivered a violent speech advocating a bill to provide that no Court created by Congress should have any power to adjudge invalid any Act of Congress, and to prohibit the Supreme Court in its appellate jurisdiction from affirming any such judgment of invalidity by an inferior Court — "a bill to abolish the Constitution," said the *New York World*.[1] "It is the distinguishing function of a Judicature to declare the law, no Court, high or low, being able to decide any case without deciding at the same time what is the law applicable to that case. This results from the very essence of the judicial function, nay, it is inseparable from the nature of things. If the laws appertaining to the question in litigation are contradictory, it is obvious that the Court must decide which law is valid and which null, before it can reach a rule for rendering justice to the parties." The *Nation* opposed Drake's bill, on the ground that "the action of Congress of late years has not been such as

[1] *Nation*, Dec. 2, 16, 23, 1869; *New York Herald*, Dec. 15, 1869; *Independent*, Dec. 16, 1869; *Chicago Republican*, Dec. 8, 1869. The *New York Times*, Dec. 14, 1869, in an account of the debate, stated that Drake's speech was not favorably received in the Senate. *41st Cong., 2d Sess.*, 2, 87 *et seq.*

to entitle it to this supreme power." The *New York Herald*, speaking of the "riotous spirit which prevails in law-making bodies where one side has an overwhelming majority", said very sanely: "The framers of the Constitution seem to have supposed that the best Congress we could ever get would still be composed of human creatures, and that, in virtue of its humanity, Congress might be liable to err. They supposed also that the representatives of the people would be drawn from all the fields of national activity, that they would be merchants, miners, farmers, ship carpenters, shoemakers, schoolteachers, bankers, drovers, etc., and that Congress might, therefore, be an assembly not learned in the law. Whilst, therefore, the crude decrees of such a body might oppress any man in his rights, it was determined that the people should always have an appeal to a given number of men who have made the law the study of a lifetime." Even the radical *Independent* was inclined to believe that there was no immediate necessity for either Trumbull's or Drake's bill, and that the Court would "hardly make a contest with Congress. Its action last winter proved that it does not choose to measure its strength with the National Legislature. It looked, one month ago, as if Mr. Chase and his Associates were bent on precipitating a decision against the Reconstruction Acts, and as if Yerger would be set free; but the Court will pause in its course, while Congress acts on the measure, for it very well knows where victory lies in such a controversy. . . . If Congress takes from it jurisdiction in political questions and it refuses to obey, Congress can impeach and remove the Court. But it will not come to that. The good sense of a majority of the Justices will avert any such conflict." The *Chicago Republican* made the following eloquent defense of

the Court: "A more dangerous, not to say absurd, attempt to destroy the Courts and make Congress supreme could not be conceived. . . . What is this but declaring Congress as the supreme authority of the Nation, placing the country under an oligarchy, none the less despotic because the people themselves elected its members? The Courts, sitting in calm isolation, removed from partisan prejudices and often exciting passions of the hour, were especially instituted as checks and balances against attempted usurpation by either the Executive or the Legislative departments, to prevent wrong or harm from hasty and inconsiderate legislation, or from misconception or wrongful appropriation of power by the Executive. . . . The truth is, Mr. Drake's proposition is in outrageous repugnance to the whole genius of republican government; and he will find, we believe, but few sympathizers with his revolutionary scheme, either in Congress or among the people. We cannot give up our Courts at present, even though experience has shown that they are not always infallible. They are safer to trust to, in matters of Constitution and law, than a tribunal selected as Congress is."

Meanwhile, before Congress took any action on the bills, a situation had arisen in the Court itself (as will be described in the next chapter) which made action seem less necessary. Moreover, by agreement between Yerger's counsel and the Attorney-General, stipulations were entered into by which Yerger was to be protected from the military, and his case became, therefore, a moot one which required no argument at the present time.[1] Thus, this hotly contested legal ques-

[1] See *New York World*, Dec. 2, 1869, Jan. 9, 1870. Later, Congress took cognizance of the case, and the House requested information as to the delay in the execution of Yerger's sentence. See *Washington Chronicle*, Feb. 5, 1870. The final disposition of this case was reported in the *New York Times*, March 12, 1870.

tion of the validity of the Reconstruction Laws disappeared from the Court's history, without any express decision.[1]

"In the Supreme Court today (March 11) Mr. Phillips stated that the counsel for Yerger, who was convicted by a military commission of the killing of Col. Crane and sentenced, having received authentic information that the military authorities had turned over the prisoner to the civil authorities of the State of Mississippi, the object of the petition was fulfilled, and therefore he moved that it be dismissed." In February, 1870, another case arose in the Court which might have called for a decision on the Reconstruction Acts, when George R. Kennedy, tried by military commission in Texas on charge of murder, applied to the Court for a writ of habeas corpus. See *Boston Daily Advertiser*, Feb. 19, 1870.

[1] It was not until as late as 1875 that the Court (whose membership by that date had been considerably changed) gave an intimation in *Raymond* v. *Thomas*, 91 U. S. 712, that it might possibly hold the Reconstruction Acts to be lawful, but the case was actually decided on a subordinate point.

CHAPTER THIRTY-ONE

THE LEGAL TENDER CASES

1869–1871

The disposition of the *Yerger Case*, in December, 1869, having removed all present danger of any judicial decision on Reconstruction, another question then came to the front, — the validity of the war legislation making the paper currency (the Treasury notes) legal tender. Though the first of these Legal Tender Acts had been passed as early as February 25, 1862, by a singular chance, no decision as to its validity had yet been reached in 1869. The constitutional issue had been involved in a case which came up on writ of error to the New York State Court, in 1863, *Roosevelt* v. *Meyer*, 1 Wall. 512, but the Court had decided in that year that it had no jurisdiction under the Judiciary Act.[1] In 1865, however, the question was presented in a case in which the Court had undoubted jurisdiction on writ of error to the Kentucky Court of Appeals, *Hepburn* v. *Griswold*, 8 Wall. 603, and it was first argued at the December Term of 1867. On the suggestion of Attorney-General Stanbery as to the great public importance of the question, a reargument was ordered for the next Term, with leave to the Government to be represented; and accordingly on December 10, 1868, it was reargued by Benjamin R. Curtis and Attorney-General William M. Evarts, against Clarkson N. Pot-

[1] Nine years later, in 1872, the Court held that this decision had been erroneous, and accordingly overruled it. *Trebilcock* v. *Wilson*, 12 Wall. 687.

ter.[1] The probable action of the Court had been the subject of long and excited debate in the community. On the one side, were the National and the State banks, the mortgagees and creditors who demanded payment in gold; lined up with these interests were those men who, on principle, denied the right of the Federal Government to make paper currency legal tender, and opposed legalized cheating through the enforced payments of debts in depreciated currency. On the other side, were the railroads, the municipal corporations, the mortgagors of land and other debtors who now sought to pay, with a depreciated legal tender currency, debts contracted on a gold basis before the war; and with these interests, there were associated all those men who felt strongly that the Government ought not to be deprived of a power which they considered so necessary to its existence in time of war. But while, as a war measure, issue of legal tender may have been necessary, there is no doubt that most thoughtful men believed that its evils outweighed its benefits, and agreed with the *Nation*, when it said that "the prevailing laxity in commercial morals, the rise of notorious cheats into position of fame and wealth, and the prostration at their feet of large masses of private property, is largely due, not simply to the spirit of speculation bred by the issue of irredeemable paper, but to the sanction given by the law to the wholesale cheating by fraudulent debtors which was the direct result of the Legal Tender Act."

Practically every State Court which had considered the question had upheld the constitutionality of the law; there was little expectation by the public or by

[1] The *Springfield Republican*, Feb. 15, 1868, stated that on Feb. 14, the Attorney-General had read to the Court a letter from Secretary of the Treasury McCulloch asking him to appear, and had stated that he had had no time to prepare and wished a postponement.

the Bar that the Court would do otherwise.[1] Soon after the argument, however, the rumor spread that its decision would be adverse; and thereupon, strong appeals were made in the press that, in view of the ruinous consequences of such a ruling, the Court should postpone decision.[2] An interesting editorial in the *Chicago Republican* strongly indorsed this rather preposterous suggestion, saying: "The gloomy prospect which presents itself to anyone contemplating the results of an adverse decision ought to convince Judges, who at the same time are statesmen, that a decision should not be given, if adverse. . . . It is plainly the general wish of the country that this tardy and ruinous wisdom of the Supreme Court should not now work universal ruin, if the decision is to be adverse to the constitutionality of the Act. Let the petty cases be dismissed and no decision be given. Harmless inaction is better than a dangerous act."[3]

While unable to arrive at a decision in this case during the December, 1868, Term, the Court did decide several cases in which it passed upon subordinate aspects of this question. In *Lane County* v. *Oregon*, 7 Wall. 71, it considered whether Congress had the power to make the paper war currency legal tender in payment of taxes to a State, and while intimating that Congress could not so interfere with the State taxing power, it held that the Legal Tender Acts were not to be con-

[1] *Nation*, Feb. 10, 25, 1869: "The Judges of most of the State Courts to whom it has been submitted, being in closer dependence on popular opinion than they have ever been before, have not unnaturally shrunk from what seemed the tremendous responsibility of gainsaying what so many good men had been saying, and the best part of the community believing for so long, on such an exceedingly delicate subject as the value and power of the currency actually in use."

[2] *Chicago Republican*, Dec. 11, 14, 21, 1868.

[3] This editorial also stated that a written opinion was obtained, though with great difficulty, from members of the Court in favor of the validity of the Legal Tender Act, at the time of its passage; and that it is now stated that "its authors will be glad to rewrite it, by a decision declaring the Act void."

strued as so providing. In *Bronson* v. *Rodes* and *Butler* v. *Horwitz*, 7 Wall. 229, 258, the Legal Tender Acts were held not to apply to obligations calling specifically for payment in gold and silver coin.

One reason for the delay in the decision of the *Legal Tender Cases* had undoubtedly been the fact that, at this time, the Court had been reduced in number to eight Judges by the operation of the Act of 1866 (passed to deprive President Johnson of the opportunity of filling expected vacancies), and hence there was danger of an even division of the Court on the question. This situation was now changed by the accession of Grant to the Presidency, and the consequent enactment of a statute (the Act of April 10, 1869), increasing the number of the Court to nine, and authorizing the President to nominate an additional Judge at the next session of the Senate. At the same time, Congress had at last provided a long-desired and long-contested judicial reform, by establishing a new Circuit Court system with nine new Circuit Judges, but without entirely relieving the Supreme Court Judges of Circuit duty.[1] To fill these new positions, President Grant made nine appointments, based largely on the recommendation of his Attorney-General, Ebenezer Rockwood Hoar of Massachusetts;[2] and on December 14, 1869, he appointed Hoar to the vacancy on the Supreme Bench. "It is a gratifying proof of the increased respect in which the Supreme Court is held that we do not hear of any attempt to foist upon it, under the

[1] As late as 1866, the *American Law Review*, I, 307, had rejoiced over the failure of the passage of Circuit Court bills introduced in Congress, April 2, 1866, March 5, 1867 (see *39th Cong., 1st Sess.; 40th Cong., 1st Sess., Senate Special Sess.*) and had said: "We trust that so mischievous a measure will never receive the assent of Congress. Mr. Webster more than once defeated similar propositions. . . . It has been well designated as a bill to prevent the Justices of the Supreme Court from ever learning any law."

[2] See *New York Times*, Dec. 9, 1869, for detailed criticism of the Circuit Court appointments.

provisions of this Act, a partisan Judge," said the *Nation*. "There seems to be a general agreement of opinion that no such appointment should be made. The reiterated assertions that the Attorney-General is to have the place show the general feeling about it. The present Chief Justice has been 'in politics' quite enough. . . . If Judge Hoar is appointed, the appointment will be an admirable one." And it further pointed out that, in the year of the Reconstruction excitement, in 1868, the Court had "touched the lowest point in its career; and now that the spirit of conservation has begun to reign again, the important problem of the hour is to bring back harmony and justice into the affairs of the country", that the Court was the agency best calculated to assist in the work, that its hands must be strengthened, and that apparently popular respect for the judicial function had begun again to appear. "As Congress and the President fell, so the Court arose in regard and esteem. The balance is at length in a fair way of being restored, and one more illustration furnished of the inherent excellence of the system of checks and balances which lies at the root of American politics. Thus one day may the future historian of America, for the instruction of generations to come, carve the lessons of the recent history of the Judiciary." Hoar's nomination was commended on all sides by the public and the press. "His distinguished abilities are conceded and his elevation to the Supreme Bench is received with profound satisfaction by all," said the *New York Times*. "One of the best that could have been made," said *Harper's Weekly*, and it mentioned his "vigorous independence, soundness of judgment, masculine good sense and legal learning." [1] That he was supremely

[1] *Nation*, Dec. 2, 1869, Jan. 6, 1870; *New York Times*, Dec. 16, 1869; *Harper's Weekly*, Jan. 1, 1870; *Amer. Law Rev.*, IV, 380. See also *Washington Chronicle*,

fitted for the position by his legal qualifications, all admitted. He was fifty-three years of age and at the height of his vigor; he had been Judge of the Massachusetts Supreme Court, and an able Attorney-General of the United States; he was also in thorough sympathy with Grant's policies. But in the Senate, the nomination met with hearty opposition from many causes. Some Senators believed that a lawyer from the South, particularly Thomas J. Durant of Louisiana, should have been appointed; others were disgruntled over the nominees recommended by Hoar for Circuit Judges; to many Senators, Hoar's brusque manners had given great offense; others resented his opposition to the Johnson impeachment; others disliked his support of Civil Service Reform.[1] He was supported by

Dec. 15, 1869, saying it "will generally be accepted as an appropriate selection, comparatively young, possessing the required learning and ability."

[1] *Harper's Weekly*, Jan. 1, 1870, said that the real ground of objection must be his "hearty contempt of the system that makes the whole civil service party plunder." On Jan. 8, it said that the Senate's virtual rejection of Hoar was reported by the *New York Times* to be due to a "sense of the affronts Senators and Representatives have received at his hands. . . . He has no one to blame for his discomfiture but himself." "This means," said the *Weekly*, "that Mr. Hoar has refused to be a mere party tool." The *Independent*, Feb. 10, 1870, said: "Nobody can deny that the Attorney-General is an able lawyer and a genuine radical. The Senate disliked him personally and looked with disfavor upon the selection of a Northern man for a Southern Circuit." The *New York Herald*, Dec. 21, 1869, stated that the Senate contrasted the "polished politeness of Evarts, and dignified but courteous bearing of Stanbery with the supercilious contempt of Hoar to his superiors." George F. Hoar in his *Autobiography of Seventy Years* (1903), said: "Judge Hoar strenuously insisted that the Judges of the newly created Circuit Courts of the United States should be made up of the best lawyers, without Senatorial dictation. President Grant acted in accordance with his advice. The constitution of the Circuit Court gave great satisfaction to the public. But leading and influential Senators, whose advice had been rejected and who were compelled, by the high character of the persons nominated, to submit and did not venture upon a controversy with the President, were intensely angry with the Attorney-General. The result was that when he was nominated by the President for the office of Associate Justice of the Supreme Court of the United States, he was rejected by the Senate. A few Senators avowed, as a pretext for their action, that there was no Judge on the Bench from the South, and that the new appointee ought to reside in the Southern Circuit. But these gentlemen all voted for the confirmation of Mr. Justice Bradley, a most admirable appointment, to whom the same objection applied." See also especially *Springfield Weekly Republican*, Dec. 26, 1869, Jan. 1, 1870, giving the causes of Hoar's rejection.

Senator Trumbull but opposed by Conkling, Edmunds, Carpenter, by the carpet-bag Senators from the South and by the Democrats. "In the whole proceedings," said the *Nation*, "the Democrats alone can be justified or excused. To them, Judge Hoar is the principal representative of a system they believed to be unconstitutional and outrageous."

While this fight was pending in the Senate, the President was given an opportunity to make another appointment. Judge Grier, who, in his seventy-sixth year and after twenty-three years' service, had become mentally and physically enfeebled, took advantage of the recent statute increasing the Judges' salaries and authorizing retirement on half pay, and sent in his resignation on December 15, 1869, to take effect, February 1, 1870. A petition was at once signed by a large majority of the Senate and of the House and presented to the President, asking that the vacancy be filled by the appointment of the late Secretary of War, Edwin M. Stanton of Pennsylvania.[1] Grant, while reluctant to make this nomination and while desiring to appoint Judge William Strong of Pennsylvania, saw a chance of conciliating the Senate with regard to Hoar; and accordingly, on Sunday, December 19, 1869 (Stanton's fifty-fourth birthday), he called on him, offered him the position and sent in his name, the next day, to the Senate, where he was promptly confirmed by a vote of forty-six to eleven. The appointment was received by the country with great differences of opinion. Though Stanton had been an able lawyer, his tempera-

[1] Judge Grier had suggested to Grant that Joseph P. Bradley of New Jersey be appointed his successor. *Independent*, Dec. 23, 1869. The *Springfield Republican* as early as Nov. 27, 1869, had urged Stanton's appointment, and it said, Dec. 26, that "as Gen. Grant never got on well with Stanton when he was in the War Department, and had some prejudice to conquer in order to bring him up to this appointment, it must have been quite a gratifying interview to the old war horse of the Army Department."

ment was such as to make him a doubtful acquisition to the Bench; for he was arbitrary, overbearing, masterful and utterly lacking in judicial poise. Nevertheless, the Republicans hailed his choice with delight, and termed it "the equivalent of a Constitutional Amendment." The *Washington Chronicle* "thrilled with joy" and said that no statesman had a firmer hold on the affections of the people. The *Chicago Republican* said it would "give general satisfaction" and that he "had few peers at the Bar." The *Springfield Republican* said that "justice is his strong point." The *New York Times* spoke of the "general congratulations" and of his "sturdy integrity, intellectual acumen and force, unswerving patriotism, high legal reputation, tireless energy." "It is a recognition of his illustrious service to his country, in the performance of which he was equalled for energy, courage and genius by no other statesman or hero of the war. . . . The peer of Bismarck in executive force, we believe that . . . he will attain a judicial eminence second to none ever achieved in the same judicial station. God bless Edwin M. Stanton!" said the *Independent.*

The Democratic press raged at the appointment. The *New York World* said that: "His enemies (and no one ever had a greater number) think him a passionate, violent and headstrong man, malignant, despotic and utterly unscrupulous. . . . His apologists have never denied that he has an impetuous temper and overbearing manners. . . . There has never been any difference of opinion between his foes and his partisans, respecting the general type and structure of his character, which is as far removed as possible from dispassionate calmness, judicial impartiality and reverence for strict law. No one could be more out of place than such a hasty, violent, imperious zealot on the bench of

the Supreme Court." The *New York Herald* stated, more fairly, that while he was fully qualified as a lawyer for the position of Judge, and while he had been honest, earnest, active, firm, resolute, decisive and efficient in the War Office, "the man of all men for the part he had to play, . . . it may be said that he was rough, imperious, despotic, cruel and offensive in many things."

Of the independent papers, the *Nation* was inclined to be hopeful. "There are many signs," it said, "that the Supreme Court is recovering from the temporary loss of influence and dignity inflicted on it by the Dred Scott decision and the events of the war. The general excellence of the President's appointments to the new Circuit Judgeships, capped by the bestowal of the vacant seats in the Supreme Court itself on Judge Hoar and Mr. Stanton, and the increase of salaries which is now pending in Congress, are all signs of a healthy reaction in the public mind as to the inestimable value of an upright, independent and honored Judiciary." Whatever Stanton's fitness may or may not have been, his sudden death from heart trouble, on December 24, four days after his nomination, put an end to the discussion. "In him, the bench of the Supreme Court loses a Judge of large experience and learning, of perfect integrity and of unflinching courage in the discharge of duty," said the *American Law Review*. "And at this time, when there is so manifest a disposition in many of our public men to undervalue the duties and to encroach upon the province of the Judiciary, and to throw aside men, confessedly fitted by character, learning, and experience to adorn the Bench, for trivial and unworthy causes, we deem that the country has suffered an irreparable loss." [1]

[1] *Nation*, Dec. 23, 1869; *Amer. Law Rev.* (1870), IV, 394; see *Chicago Republican*, Dec. 22, 25, 1869; *Independent*, Dec. 23, 30, 1869; *New York Times*, Dec. 21, 25,

As the Senate had not confirmed Hoar, and as, after January 8, 1870, it was certain that it would not do so, the President had still two appointments to make.[1] For the Grier vacancy, Benjamin H. Brewster of Pennsylvania, and Judge George P. Fisher of Delaware were urged; and in place of Hoar, Thomas J. Durant of Louisiana and Senator Charles D. Drake of Missouri. "What the country wants is purity, honesty, ability and fearless radicalism," said the *Independent*. "The country distrusts lawyers, when it comes to questions of loyalty and human rights. What we want now is two or three sincere and obstinate radicals on the Bench . . . with a sincere, profound belief in the equality of human rights." [2] Very early in January, the President had informed visitors that he had decided to appoint Judge Strong to the Grier vacancy; [3] but the

27, 1869, stating that: "The commission of Mr. Stanton as Associate Justice had not been signed at the time of his death, but in the course of the day the President appended the signature and sent the paper to the widow as a mark of respect." *Washington Chronicle*, Dec. 25, 1869; *New York Herald*, Dec. 25, 1869; *New York World*, Dec. 22, 1869. On Dec. 24, the *World* published an editorial containing invective against Stanton of the most extreme nature; and after his death, it said, Dec. 25: "When Mr. Stanton's character is viewed in its true light, he will be regarded as the most faithful personal embodiment of the passionate and vindictive spirit of the period in which he acted;" see *Springfield Weekly Republican* stating, Jan. 1, 1870, that the *World's* rancor against Stanton was due to the latter's refusal to give a pass, in 1864, to a *World* correspondent, to whom he said: "No favor can be given here to a treasonable newspaper."

[1] See *New York Times*, Jan. 8, 10, 1870; *Ebenezer Rockwood Hoar* (1911), by Moorfield Storey and Edward W. Emerson. James Russell Lowell wrote to Hoar: "Don't let your name be withdrawn. Let the responsibility lie with the knaves who hate you for your impregnability and haven't the courage to say so." Hoar's nomination was finally defeated by the Senate, Feb. 3, 1870, by a vote of 24 to 33.

[2] The *Nation* said, Feb. 16, 1870: "We are informed that it was in contemplation to urge Mr. Durant of New Orleans for the Judgeship which Mr. Hoar did not get. Mr. Durant is, and was before the war, a leading member of the Louisiana Bar, was a staunch Union man during the war and a man of the highest character, both professional and personal. His appointment would supply what is greatly needed — a Civilian on the Supreme Bench. The want of any Judge versed in Civil Law is often severely felt in appeals from Louisiana, Texas and California."

[3] *Independent*, Jan. 6, Feb. 10, 1870; *New York Times*, Jan. 10, 1870; *New York Herald*, Jan. 20, 1870, *Nation*, Jan. 6, 1870. The *Springfield Weekly Republican*, Jan. 15, 1870, stated that Strong had been definitely selected and that he had long been "a prominent and honored citizen . . . and will be a real addition to the working ability and legal character of the Court."

hope was generally expressed that he would not repeat what the *Nation* termed "an act of very doubtful propriety" and "a dangerous precedent", when the President had nominated Stanton to the Supreme Bench "long before any vacancy existed, the immediate result of which was the curious spectacle of a Judge dead and buried in state while his predecessor sits on the Bench and goes to the funeral."

During all this time, when the question of filling the vacancies was pending, the Court had been withholding making public a decision at which it had arrived; for on November 27, 1869, four Judges had agreed in holding the Legal Tender Act unconstitutional as applied to contracts made before its passage, and Judge Grier, who had at first declared himself in favor of the Act, had finally changed his view and agreed with the majority. As three Judges dissented, the rendering of the opinion was delayed until the varying views could be definitely reconciled. In the meanwhile, however, the Court, on December 13, 1869, decided the important case of *Veazie Bank* v. *Fenno*, 8 Wall. 533, argued for the State banks by Reverdy Johnson and Caleb Cushing and by Attorney-General Hoar for the Government. In this case, the power of Congress to restrain by taxation the circulation of State bank notes as currency was upheld, as an appropriate means under the Constitution of providing a National currency for the country. Chief Justice Chase held the tax was not a direct tax; and stated that without this power of taxation, the Government's "attempts to secure a sound and uniform currency for the country must be futile." That the tax was so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the State bank, he held was a matter which the Court could not consider. "The power to tax may be exercised

oppressively upon persons, but the responsibility of the Legislature is not to the Courts, but to the people, by whom its members are elected." [1] From the broad construction given to the "necessary and proper" clause of the Constitution by the Chief Justice in this case, the country was led to believe that he would render a similar favorable decision in the *Legal Tender Case* then pending.[2] No definite knowledge, however, as to the actual decision at which the Court had arrived in the previous November leaked out; and on January 4, 1870, the *New York Times* stated that: "From all that can be learned of the matter, it is reasonably certain that no decision will be reached during the present Term. No consideration has yet been had in the case by the Court, and inasmuch as the Court will be reorganized by the addition of two new members, it is altogether probable that the cases will be ordered to be reargued before a decision is made." On January 21, the *New York World* stated that in the three important litigations arising out of the war, the *Legal Tender Case*, the *Cotton Tax Case* [3] and the *State Test Oath Case*, the

[1] James M. Beck in *Nullification by Indirection, Harv. Law Rev.* (1911), XXIII, said that *Veazie* v. *Fenno* first announced the doctrine "that the Judiciary is without power to prevent the nullification of the rights of the States by the exercise of Federal powers for unconstitutional purposes." See also *McCray* v. *United States* (1904), 195 U. S. 27; *The Extension of Federal Control through the Regulation of the Mails*, by Lindsay Rogers, *Harv. Law Rev.* (1913), XXVII; *Power of Regulation Vested in Congress*, by Max Pam, *ibid.* (1910), XXIV.

[2] The *Cincinnati Daily Chronicle*, Dec. 15, 1869, stated that the decision "must settle the validity of the Legal Tender Law." The *New York World*, Dec. 16, 1869, said as to this decision that "there was a manifest indecorum in Judge Chase's taking part, as he was the real author of the scheme for taxing State banks out of existence"; and that his opinion "was an elaborate defense of his own policy when he was Secretary of the Treasury. He is the father of the present system of National Banks. He was the instigator of the tax whose manifest design and real effect was to cripple and crush the rival State institutions", and that his sense of propriety should have led him not to sit.

[3] This case, *Farrington* v. *Saunders*, involving the question whether the Cotton Tax was a "direct tax" had been argued, Dec. 8, 9, 1869, by Philip Phillips, Albert Pike, R. W. Johnson, W. L. Sharkey, James Hughes, John A. Campbell, Benjamin R. Curtis and Robertson Topp against Attorney-General E. R. Hoar. See *New York Herald*, Dec. 9, 1869. It was not decided until 1871, when by an evenly divided

opinions of the Court would probably be adverse. "Great anxiety," it said, "is felt in reference to these decisions; and the expectation that the decision adverse to these Acts would irritate the Radicals in Congress has made some go so far as to impute timidity, as one of the reasons that there is not a full Court. The idea is thus obtaining currency that the Court will not have the nerve to perform their duty in these cases, and that these important cases will be suffered to sleep as they have done for so many months." The want of justification for this charge of lack of nerve on the part of the Court was seen, when within two weeks, on February 1, 1870, the Court rendered a decision in the *Test Oath Case* upholding by a four to four division the validity of the Missouri statute.[1] On Saturday, January 29, 1870, the Court had met in conference and adopted the form of its final opinion in the *Legal Tender Case*; but that the speculative surmises of the press as to its action in this latter case were far from accurate may be seen from the *New York Tribune's* statement of February 1, that a consultation had been held and that "there is ground for believing that the decision will not go into the question of the constitutionality of the law,

Court, the decision of the lower Court upholding the validity of the tax was affirmed; it is not reported in *Wallace Reports*. See *67th Cong., 2d Sess.*, March 13, 1922.

[1] This case, *Blair* v. *Thompson & Ridgely* (not reported in *Wallace Reports*), had been begun in 1866 to test the constitutionality of a Missouri statute depriving all persons of a right to vote who did not take an oath that they had not participated in hostilities against the Nation or the States. See *New York World*, Jan. 9, 21, Feb. 2, 1870. The *Independent* said, Feb. 10, 1870: "Mr. Chase gave his vote in favor of the constitutionality of the oath and saved it from overthrow. This shows two things, first that he is not a modern Democrat; and second that he is not seeking a nomination to the Presidency from the Democratic party." See also *New York Times*, Feb. 1, 1870; *New York Tribune*, Feb. 1, 1870, for a full report of the case. It was argued by Montgomery Blair against Senator Drake. The Judges divided — Nelson, Grier, Clifford and Field against the statute, Chase, Swayne, Davis and Miller for it; see *Boston Daily Advertiser*, Feb. 1, 1870. On the same day, the Court by another four to four decision (not reported) upheld the validity of the Act of Congress forbidding suits against United States officers who took or destroyed property in the South as a war measure. See especially *Springfield Republican*, Feb. 2, 4, 1870; *Boston Daily Advertiser*, Feb. 2, 1870.

but will decide that all contracts made previous to the passage of the act contemplated payment in gold." [1] The Court had intended that its opinion should be delivered on Monday, January 31, when Judge Grier would still be a member of the Court and would be one of the five Judges constituting the majority; but out of deference to the minority, who wished for further time to prepare their dissenting opinions, the matter was postponed for a week.[2] On February 7, Chief Justice Chase announced the opinion of the Court, which was concurred in by Judges Nelson, Clifford and Field, with Judges Miller, Swayne and Davis dissenting, — *Hepburn* v. *Griswold*, 8 Wall. 603.

On the underlying principles of law, both the majority and the minority agreed in accepting Marshall's statement of the implied powers of Congress as set forth in *McCulloch* v. *Maryland*. The Chief Justice, however, held that the attempt to impart the quality of legal tender to the Government paper currency was not "an appropriate and plainly adapted means for carrying on war"; and that the argument by which the legality of the statute was defended carried the doctrine of implied powers too far, and "asserts that whatever in any degree promotes an end within the scope of a general power, whether, in the correct sense of the word, appropriate or not, may be done in the exercise of an implied power. . . . Undoubtedly, among means appropriate, plainly adapted, really calculated, the Legislature has unrestricted choice." But it was for the Court to determine whether the means adopted came within that category. He held, moreover, that "a law not made in pursuance of an express power,

[1] *New York Tribune*, Feb. 1, 4, 1870; see also *Boston Journal*, Feb. 2, 1870, which said that the opinion "will carefully avoid the question of the constitutionality of the Act itself;" *Independent*, Dec. 23, 1869.

[2] See statement of Chief Justice Chase in *Knox* v. *Lee*, 12 Wall. 457.

which necessarily and in its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the Constitution." And finally, referring indirectly to his own support of this law when Secretary of the Treasury, he said: "It is not surprising that amid the tumult of the late civil war, and under the influence of apprehensions for the safety of the Republic almost universal, different views, never before entertained by American statesmen or jurists, were adopted by many. The time was not favorable to considerate reflection upon the constitutional limits of Legislative or Executive authority. If power was assumed from patriotic motives, the assumption found ready justification in patriotic hearts. Many who doubted, yielded their doubts; many who did not doubt were silent. . . . Not a few who then insisted upon its necessity, or acquiesced in that view, have, since the return of peace, and under the influence of the calmer time, reconsidered their conclusions." Accordingly, so far as the Legal Tender Act applied to contracts made before its passage (which was the only question actually involved in this case), the Court held the Act unconstitutional. The reasoning, however, contained in the Chief Justice's opinion was equally applicable to cases of contracts executed after the passage of the law and would render it equally invalid as to them. The minority, after reviewing the conditions of the war when the Act was passed, held that "this law was a necessity, in the most stringent sense in which that word can be used"; and they described the war in terms which have a very modern sound, as "a war which, if we take into account the increased capacity for destruction introduced by modern science and the corresponding increase of its cost, brought into operation powers of belligerency, more potent and more expensive than any that the world has ever known."

Apart from the question of impairing obligation of contract, the real difference between the majority and the minority was simply one of fact, *viz.* whether Congress might, within the bounds of reason, have considered the issue of legal currency to be "necessary" for the carrying on of the war.

At first, the decision was not regarded as of great consequence, as its effect was supposed to be confined merely to cases of contracts made before the war. "The decision is not unexpected," said the *New York Times*, "and in no manner involves the constitutionality of the law itself. . . . There will be hardship, undoubtedly, and in some instances injustice; but the judgment of the Court rests upon an intelligible, if not an agreeable or entirely defensible principle, the promulgation of which constitutes another reason for the restoration with all convenient speed of specie payments." [1] "This decision is of much less consequence than it would have been if it had been rendered five years sooner," said the *Independent*. "In 1870, it is not a means of protection or redress, but only a message of condolence." "It would have been of great importance had it been 'more timely,'" said the *New York World*. The *Washington Chronicle* said that while the decision was "an insidious assault upon the great measure which saved the country during the rebellion", it was not likely to work any serious injury. "The confidence in the greenbacks is too great to be shaken by judicial decision." The *New York Herald*, which also

[1] The *New York Times*, Feb. 8, 1870, said: "There was a great deal of perturbation and much confusion at the Capitol today at the announcement. . . . The Court-room was crowded; but little satisfaction was obtained in listening to the reading of the decision . . . by the Chief Justice, as he was almost wholly inaudible;" see also *Washington Chronicle*, Feb. 12, 1870; *Independent*, Feb. 10, 17, 1870; *New York Herald*, Feb. 8, 9, 16, 22, 1870; on Feb. 24, it said: "The decision does not foreshadow a decision denying the validity of the act. . . . There is not a vestige of probability that the Court will go a step further."

favored the greenbacks and opposed the National banks, at first took this restricted view of the opinion and said that the Court had avoided holding the Legal Tender Act unconstitutional as to present contracts — a decision which would have "involved the whole country in financial chaos and the Government perhaps in bankruptcy and repudiation. . . . We have no fears that the Supreme Court will risk, for a long time to come, a decision against our greenback currency as legal tender." And it stated that with the new members on the Court it expected a favorable decision. "The Court, even when most strongly seasoned with State-Rights, has carefully avoided any disturbing collision with Congress." The *Nation* said, presenting what was probably the view held by most thoughtful men: "There is little question, whatever be the objections to the decision on general grounds, that it will accelerate the return of specie payments and give a useful fillip to the moral sense of the country, and especially of the knavish portion of the public. . . . Legal tenders are one thing; depreciated legal tenders are another thing; and no Court can be expected to declare cheating lawful, unless it is plainly and unmistakably obliged to do so by the recognized decrees of the sovereign authority. . . . The Court can very well say, and does say, that it knows nothing of legislative necessity, but that it does know that nothing but express direction would justify it in declaring lawful and justifiable the evasion of a clear moral obligation." As to the opinion of the dissenting Judges, it said: "The strong point of Judge Miller's argument is, as might be expected, what is the Chief Justice's weakest — the impropriety of taking from Congress and committing to a Court of Justice a task so plainly legislative in its nature as the decision what means are necessary and proper to the performance of

a duty, so complex, so delicate and so full of unforeseen contingencies . . . as the government of a great Nation during a great war, even within the limited sphere prescribed by our written Constitution. . . . And yet if the interpretation of a written Constitution is not committed to Judges, what use is it? If the majority can do whatever they choose to declare constitutional, what better is it than the revocable charters which absolute sovereigns in Europe amused themselves by granting, for some years after 1815?"[1]

The views of the other side were presented by *Harper's Weekly*, which said that: "It is dangerous to deprive ourselves of an essential means of warfare and defense on such delusive grounds. It will soon appear that the Legal Tender Act cannot safely be dispensed with. Its constitutionality is clear, and it should remain with Congress to decide when it shall be inoperative. The Court has overstepped the just line of its authority, and attempted to restrict Congress in this matter, when the framers of the Constitution decided to leave them free of such restriction." The *New York Times* stated that: "The effect of the decision, if allowed to stand, upon the future of the country if it shall unfortunately be involved in war, will constitute its worst feature. It strips the Nation of one of its means of warfare and defense."

As soon as it became evident that, though the case before the Court involved only the effect of the Act upon contracts made before its passage, the reasoning of the majority opinion was such as to make it unconstitutional both as to contracts entered into after, as well as before, a strong movement arose in the community to urge the Court to grant a rehearing, or to

[1] *Nation*, Feb. 10, 17, 1870; *Harper's Weekly*, March 19, April 16, 1870; *Springfield Weekly Republican*, Feb. 11, 18, 1870; *New York Times*, Feb. 12, March 8, 1870.

review the whole question on argument of other cases pending on the docket.[1] Those who believed the decision to be disastrous not only in its financial, but in its governmental effect, were encouraged in this movement by the fact that at last the two long-pending vacancies in the Court had been filled and the appointees confirmed. For on February 7, on the same day and at the very time when Chief Justice Chase was reading his opinion in the *Legal Tender Case*, President Grant sent in to the Senate the names of William Strong of Pennsylvania to fill Grier's place, and of Joseph P. Bradley of New Jersey to fill the new Judgeship for which Hoar's name had already been rejected.[2] The legal qualifications of both were eminent; and while they were believed to favor the necessity of a strong National Government, both were entirely free from political entanglements, or suspicion of political activity or ambition. Strong was sixty-two years of age, and had been for eleven years a Judge of the Supreme Court of Pennsylvania. Bradley was fifty-seven years of age; he had been highly prominent at the Bar of New Jersey, which regardless of party had urged his appointment, and though a Republican, he had been earnestly recommended to the President, in the previous December, by a Democratic Judge, Grier.[3]

[1] The *Nation*, March 24, 1870, said that the scheme for reversing the decision grew out of the notorious dislike of the Senators for Chief Justice Chase and out of efforts of moneyed corporations. "So far as the public is concerned, there has not been a breath of popular discontent to justify any political movement; and yet grave men have doubted the result; Senators have fully expressed their opinion that the decision must be reversed; Congressmen have furiously denounced it as rivalling the Dred Scott decision in bad preëminence."

[2] See *Amer. Law Rev.*, IV, 394, saying that Hoar's rejection was a scandal, and that the reasons given by the Senate as to the tartness and acerbity of Hoar's manners were puerile and trivial.

It may be noted that Bradley had a middle initial "P", but no middle name.

[3] The *New York Tribune*, Feb. 9, 1870, said: "General Grant has nominated very good lawyers for the Supreme Court, but none truer or fitter than Bradley"; see also *New York Times*, Feb. 8, 1870.

The coincidence that the appointments were made on the day of the rendering of the adverse Legal Tender decision soon gave rise to a story, which later had much currency, that "Grant packed the Court" for the purpose of obtaining a reversal of the decision. The charge has been conclusively answered many times, but still occasionally crops out in attacks on the Court.[1] The facts themselves disprove the accusation. Both Judges were nominated on recommendation of Hoar, who later formally stated that their views on the Legal Tender issue had nothing to do with his recommendation. Strong's appointment had been decided on, fully a month before February 7; and Bradley's had been urged on the President and favorably considered, before Hoar's own appointment in the previous December.[2] The President himself formally stated that he had no advance knowledge as to the decision of the Court, and members of his cabinet later stated the same thing. The newspapers of the time clearly show that there was no leak as to the decision, for their published forecasts were inaccurate.[3] Since practically every State Court (except Kentucky) and every prominent Republican lawyer held the view that the Legal Tender Act was constitutional it would have been impossible for the President to find any State Judge or any lawyer

[1] See *Nation*, April 7, 1870, March 7, 1872. In its issue, April 11, 1872, it stated that it considered that Hoar (the Ex-Attorney-General) had fully answered the charges; *ibid.*, April 5, 1872, Nov. 9, 1876. See especially for full statement, *The Charge of Packing the Court against President Grant and Attorney-General Hoar* (1895), by George F. Hoar; see also Hoar's speech, April 1, 7, 1874. *43d Cong., 1st Sess.*

[2] The *New York Herald*, Dec. 16, 1869, said that Strong's name was being considered for Grier's place; see also *New York Tribune*, Feb. 7, 1870; *New York World*, Feb. 15, 1870, saying that Bradley was Grant's original choice before he appointed Hoar.

[3] See Washington correspondent of *Boston Daily Advertiser*, writing Feb. 6, 1870. That at least one prominent statesman, however, had advance knowledge is seen from George S. Boutwell's statement in his *Reminiscences of Sixty Years* (1902), IV, 209, that Chase told him of the Court's conclusion "two weeks in advance of the delivery of the opinion."

of his own party who differed from Strong and Bradley in the view which they later expressed on the Supreme Bench. Moreover, if Grant had desired to "pack the Court", it would have been far easier to do so by appointing some Judge more acceptable to the Radicals than the conservative Strong, and also by appointing a carpet-bag Judge from the South instead of Bradley; for it was known at the time of the appointments that Strong was not popular, and that Bradley's confirmation by the Senate would be very doubtful, owing to the prevalent sentiment that at least one vacancy should be filled by a Southern lawyer. "Bradley's nomination is a surprise," said the *New York Tribune's* Washington correspondent, "and the comments of Senators make the opinion general that both are looked upon with disfavor. In regard to Judge Strong, the time of his nomination is very inopportune, on account of the decision of the Supreme Court just rendered on the *Legal Tender Cases*. That decision has stirred up the more radical members of the Republican party in Congress and especially the Senate. . . . Judge Strong they think a man as conservative as either Chase or Field. . . . Bradley lacks a National reputation"; and the *New York Herald* said that "the Senate vigorously inveigh against Bradley. The carpet-bag Senators are particularly ferocious on the appointment of Bradley . . . and demand to have a man from their own section. A pure Southerner is their ultimatum. Bradley, though personally acceptable to every Republican Senator, notwithstanding his conservative record, carries with him the same objection as Hoar as to locality." There was "universal feeling of surprise" at Bradley's appointment and "Northern and Southern Senators have strongly urged the President to withdraw it," said the *New York World*. While Strong was finally confirmed

by the Senate on February 18, Bradley's nomination was postponed, awaiting action on a bill then pending in Congress requiring Judges to reside in the Circuit to which they were appointed; but it was finally confirmed on March 21, by a vote of forty-six to nine, receiving the support of the Democrats and the opposition of the Southern Republicans.[1] The best evidence that the Democrats did not then suppose that Grant was "packing the Court" appears to be the highly flattering editorial comment of the *New York World* on Judge Bradley. "By this result, the Court gains an accomplished jurist, and the carpet-baggers are disgracefully defeated in their scheme of foisting upon the highest judicial tribunal in the land one of their own class. . . . The Democratic Senators, have, from the first, hailed the nomination of Mr. Bradley as that of one so respectable and worthy, though a Republican, that the wonder grew how Grant ever came to pick him out. . . . He is in all respects worthy of it. We confidently look to him and to Judge Strong as active allies with the Chief Justice and his conservative brethren in keeping the great tribunal of the land up to the mark where Marshall and Taney left it. Mr. Bradley goes on the Bench utterly untrammelled."

On March 25, four days after confirmation of the Judges, Attorney-General Hoar produced a sensation by moving in the Supreme Court that two of the *Legal Tender Cases*, *Latham* v. *United States* and *Deming* v. *United States*, then pending and which involved contracts made after the passage of the Act be taken up for argument. While predictions had been current that

[1] *New York Herald*, Feb. 8, 18, 1870; *New York World*, Feb. 9, 1870, March 1, 3, 1870. On March 2, Bradley's name came up in the Senate and after speeches by the Southern Senators opposing him, action was postponed. *New York World*, March 22, 23, 1870; *Boston Daily Advertiser*, March 22, 1870, described fully the confirmation and the opposition of Southern Senators and of Thayer of Nebraska.

such an attempt would be made, and while the Radical Republicans and the Greenbackers were threatening dire results politically and financially, unless the Court should reopen the question, nevertheless, the general public had assumed that the question of constitutionality was to be considered as completely settled in the *Hepburn Case*.[1] Hence, when on April 1 the Court announced that the cases would be heard on April 11, on all the questions involved, thus reopening the *Hepburn Case*, the action produced a marked sensation in the community;[2] and there was much sympathy expressed with the vigorous dissent filed by Chief Justice Chase, and Judges Nelson, Clifford and Field. The Court's reasons, however, for granting a rehearing were well stated later by Judge Strong, 12 Wall. 529: "It would be difficult to over-estimate the consequences which must follow our decision. They will affect the entire business of the country, and take hold of the possible continued existence of the government. If it be held by this Court that Congress has no constitutional power under any circumstances, or in any emergency, to make treasury notes a legal tender for the payment of all debts (a power confessedly possessed by every independent sovereignty other than the United States), the Government is without those means of self-preservation which, all must admit, may, in certain contingencies, become indispensable, even if they were not when the Acts of Congress now called in question were enacted. It is also clear that if we hold the Acts invalid as applicable to debts incurred or transactions which have taken place since their enactment, our decision must cause, throughout the country, great business derangement, widespread distress and the

[1] See *Nation*, March 24, 1870.
[2] See *Boston Daily Advertiser*, April 2, 1870.

rankest injustice. . . . These consequences are too obvious to admit of question."

Of course, the answer to all this was, that the Court should not concern itself with "consequences", but only with the question of constitutional limits, regardless of results produced. There was, however, popular support in many directions, chiefly based on financial reasons, for the Court's action in ordering a rehearing; while the argument that the authority in the Government was requisite for the public security was naturally an appealing one. *Harper's Weekly*, which favored reargument, issued this warning to the Court: "The relations of the Court to Congress, as prescribed in the Constitution, constitute a powerful reason for the utmost delicacy in the treatment of questions of Congressional power. . . . Far be it from us to wish to limit in any degree the perfect independence of the Judiciary, as we regard this freedom as the sheet-anchor of our safety; but prudence requires that a tribunal, subjected so materially to the power of Congress by the fundamental law, should continue to use the same delicacy in questions affecting Congressional power which governed the Court when Marshall presided over its deliberations. Its dignity and usefulness will always be promoted by extreme caution. The exhibition of this care will command public confidence, and prevent extremities in providing for the *regulations* which Congress is empowered to make." The *Nation*, on the other hand, stated that there was danger to the Court in the process through which it was now going, and that it would never long survive the loss of popular respect: "We find very little difference of opinion in the press as to the gross impropriety (to use a very mild term) of the reopening of the Legal Tender decision. It is, in every way one looks at it, a blunder." It feared,

moreover, that this was a beginning of refusal by parties affected by a decision to accept any ruling as final; and it said that "the country ought to speak out boldly against these disgraceful beginnings."[1] The *Springfield Republican* said that it still hoped that "the country is to be spared this great wrong and scandal of a reversal."

Whatever may have been the popular view in 1870, there is no doubt that ever since that era the Court's action in reopening its first decision has been regarded as a very grave mistake — and a mistake which for many years impaired the people's confidence, not in the honesty, but in the impartiality and good sense of the Court. Not only was the Court's action unfortunate, but the manner in which it was taken caused an unpleasant degree of friction, — an instance of which on April 11, 1870, was described by a Washington correspondent as follows: "There was a very lively scene at the Supreme Court this morning, the oldest lawyers practicing there having witnessed nothing like it in their day." Counsel during the argument of the Latham and Deming appeals having stated that when Evarts was Attorney-General an order had been made by the Court that these cases should abide the result in the *Hepburn Case*, Attorney-General Hoar now denied that there had been any such order, and "the Chief Justice here interrupted to say that according to his recollection such an order had been made. This was said with evident feeling and Justice Miller remarked with equal feeling that he knew of no such order. Justice Nelson came to the rescue of the Chief Justice, and Justice Davis spoke up, saying that he concurred with Justice Miller. The Chief Justice repeated his statement with emphasis

[1] *Harper's Weekly*, April 16, 1870; *Nation*, April 7, 14, 21, 28, 1870; *Springfield Republican*, April 8, 1870.

and hardly suppressed passion, and then upon the suggestion of Judge Davis, who remarked that it was not worth while to bandy words, it was decided that the cases might go over to next Monday. The Attorney-General meantime bowed to the recollection of the Chief Justice, and merely expressed his regret that in a matter of this importance there was no record."[1] This action of the Court, however, in reopening the question had no immediate effect; for on April 18, 1870, the counsel for the appellants in the *Latham and Deming Cases* moved to dismiss their appeals, and after some discussion and variance of opinion, the motion was granted.[2] The *American Law Review* expressed the hope, which was shared by most conservative men, that the question was finally settled and would not be disturbed in the Court: "The inferior Courts throughout the country have been adapting their opinions to the decision pronounced in *Hepburn* v. *Griswold*, and declaring contracts made previous to the passage of the Legal Tender Act, payable in gold. This has gone so far that we observe in our recent exchanges one or two reported decisions following *Hepburn* v. *Griswold*. To upset *Hepburn* v. *Griswold* now would be to upset all these subsequent

[1] *Boston Daily Advertiser*, April 12, 1870. On April 13, it said that the affair had been the subject of a good deal of talk among lawyers present and that the Chief Justice showed strong passion. "It is evident that there is a state of feeling in the Court by no means pleasant." *Amer. Law Rev.* (1870), V, 158, 366; the *Nation*, April 14, 1870, spoke of "an unseemly squabble on the bench in open Court."

Chase prepared a memorandum in which he made allegations that the Judges who formed the minority in the *Hepburn Case* and who now were part of the majority of the Court had agreed that the *Hepburn Case* decision should settle all the other cases pending. This raised a point of bad faith on the part of his associates, and learning that they were prepared to deny it, Chase withdrew his memorandum. Later its substance appeared in a biography; whereupon in 1901, Charles Bradley in *Miscellaneous Writings of the late Hon. Joseph P. Bradley* (1902) published for the first time a statement written by Judge Miller and signed by the majority of the Court, April 30, 1870, giving a detailed statement of all facts concerning these cases, which completely disproved Chase's allegation; see also *Green Bag* (1902), XIV, 203.

[2] *Latham and Deming's Appeals*, 9 Wall. 145; *Boston Daily Advertiser*, April 22, 1870.

adjudications; and that the business interests of the country can demand such chronic vacillation in the law as this would imply, we cannot believe. And this, too, is a minor point. The great objection to opening the Legal Tender decision is, that the Supreme Court cannot do it without degrading itself in the eyes of all intelligent men; and this fact, we should think the new members of the Court would recognize, quite as distinctly as the old. We believe we express the opinion of every unbiased lawyer throughout the United States, when we say that the reopening of the *Legal Tender Cases* would be a terrible blow at the independence and dignity of the profession."

There was, moreover, a general relief over the withdrawal of the appeals, since it seemed apparent that, if the decision should be reversed, a political movement might be initiated to reverse this second decision, by adding still more Judges to the Court; and thus the question of the Judiciary might be injected into the approaching Presidential campaign. All hopes, however, that the issue might be considered settled were dashed when, on April 30, 1870, the Court ordered the reargument of the case of *Knox* v. *Lee*, 12 Wall. 457, which had been already argued in November, 1869, and which involved primarily the confiscation law of one of the Confederate States. At the reargument on February 23, 1871, counsel for both sides admitted the validity of the Legal Tender Acts so far as they affected this case, and did not raise the point; but at its close, Clarkson N. Potter, who had argued the *Hepburn Case*, asked to be heard on the constitutional question; and the Court, over the dissent of Judges Clifford, Nelson and Field, ordered a second reargument by Potter and Attorney-General Akerman, on the constitutional question. The matter being thus reopened, and heard

on April 18, 19, 1871, the Court rendered a decision, ten days later, on May 1, reversing *Hepburn* v. *Griswold* and sustaining the Legal Tender Acts in the broadest possible manner, as a valid exercise by Congress of the war power, in respect to all contracts whether made after or before the passage of the Acts. In this opinion, the new Judges Strong and Bradley united with the former minority, Swayne, Miller and Davis, while the Chief Justice, Nelson, Clifford and Field dissented and reaffirmed their previous decision.

This reversal by the Court of a decision which had been rendered only fifteen months before was regretted on all sides, both by many who agreed with its conclusion as well as by those who held the contrary view. "It is a grievous mistake," said the *Springfield Republican*. "It will greatly aggravate the growing contempt for what has long been the most respected and the most influential department of our government, its Judiciary." "The present action of the Court," said the *Nation*, "is to be deplored, first, because this sudden reversal of a former judgment which had been maturely considered after full argument, will weaken popular respect for all decisions of the Court including this last one; second, because the value of a judgment does not depend on the number of Judges who concur in it — Judges being weighed, not counted, and because of the rehearing of a cause, in consequence of the number of Judges having been increased, is peculiarly, and for obvious reasons, objectionable, where the number is dependent on the will of the very body whose acts the Court has to review, and which in this very case it is reviewing; and third, because the Judges who have been added to the Bench since the former decision are men who were at the Bar when that decision was rendered, and were interested professionally and personally in having a dif-

ferent decision. We do not mean to insinuate that this has affected their judgment, but we do say that it is not enough for a Judge to be pure; he must be likewise above suspicion; that is, he must not only be honest, but must give no man any reason for thinking him otherwise than honest."[1] Many who believed in their absolute honesty felt that the new Judges, as a matter of propriety, should have refrained from taking part in the decision; and they agreed with the *New York Tribune*, which said that the assurance given by various papers that the new Judges divested themselves absolutely of their railroad interests in going upon the Bench did not touch the point of the complaint. "It was an essentially improper thing that a recent and earnest paid advocate of the constitutionality of the Legal Tender Act should take his seat upon the Supreme Bench to decide its constitutionality. Let him be as pure as snow, he cannot, for this, escape condemnation. . . . It will not be easy to restore public respect and reverence for the tribunal which this decision has sacrificed." With this violently Republican paper, the equally violent *New York World* joined in assailing the decision and reiterating the charge, which had been made in the previous year, that the Court had been "packed" — a charge which, as noted above, has since been completely exploded. "The decision provokes the indignant contempt of thinking men. It is generally regarded not as the solemn adjudication of an upright and impartial tribunal, but as a base compliance with Executive instructions by creatures of the President placed upon the Bench to carry out his instructions." And in this curious combination of news-

[1] *Nation*, April 27, 1871; *New York Tribune*, May 1, 2, 1871; *New York World*, May 3, 8, 1871; *New York Times*, May 3, 1871; *New York Herald*, May 3, 1871; *Springfield Republican*, May 5, 1871; *Harper's Weekly*, May 20, 1871; *Cincinnati Enquirer*, May 6, 8, 10, 1871.

paper opinion, the *New York Evening Post* joined, declaring that the decision was the voice of the Administration, and not of the law, and that under this practice of reconstituting the Court, if tolerated, "the Constitution and its interpretation cease to limit the National Government and become just what the appointing power choose to make them."

On the other hand, an equally curious combination of diverse political and other interests defended the decision. "Happily for the country, the opinion of the Chief Justice did not prevail," said the *New York Times.* "The country will be satisfied," said the *New York Herald.* That the character of the new Judges "forbids any suspicion of other than the best motives in their action", was the view of *Harper's Weekly;* and it added (with some extravagance of statement) that the chief class of person who would regard the decision "with profound disgust" was "all those who wish to see the powers of the National Government against its enemies weakened." And the *Cincinnati Enquirer,* a Democratic advocate of greenbacks, stated that the people of the country would be benefited by the decision, though the Republican charges against the Republican Judges were "very mortifying to every American who has pride in the honor of his country and in the integrity of the Judiciary." There was thus presented the singular spectacle of strong adherents of National power opposing a judicial opinion which voiced most extreme limits of such power, and ardent advocates of a non-centralized Government praising a decision which vastly increased the authority of the National Government.

In the year following its decision in the *Legal Tender Cases,* the Court once more upheld in the most extreme terms the powers of the National Government in its

relation to the States. In *United States* v. *Tarble*, 13 Wall. 397, a State Commissioner of Wisconsin had issued a writ of habeas corpus discharging a man held by the United States Army for trial by military tribunal on charge of desertion. The Court held, on March 11, 1872, that if on application for habeas corpus made to a State official it should appear by the return that the petitioner was "confined under the authority or claim and color of authority of the United States by an officer of the Government", the writ must be refused; and that the State official had no power to issue a writ under such conditions. "Whenever any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the National Government must have supremacy until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States. This temporary supremacy, until judicial decision by the National tribunals, and the ultimate determination of the conflict by such decision, are essential to the preservation of order and peace, and the avoidance of forcible collision between the two Governments." It is interesting to note that a Democratic Judge, Field, wrote this opinion, reasserting the National supremacy previously voiced by a Democratic Chief Justice in the *Booth Case* while the Republican Chief Justice, Chase, dissented in an opinion strongly upholding the powers of the States.

In 1873, in *Olcott* v. *Supervisors*, 16 Wall. 678, the Court reaffirmed its adherence to a doctrine, which it had first announced in 1864, and which, upheld throughout this critical post-war period, probably had a more important effect upon the commercial development of the country than any other of the Court's extensions of National power. This was the doctrine

by virtue of which the Federal Courts were held to be vested with power to disregard the decisions of State Courts on the validity of the issue of municipal bonds. The decision asserting this power arose out of economic conditions which had prevailed for a long period prior. From 1840 to 1860, the States of the Union, especially in the Central West, had run riot in authorizing municipalities to vote money and to issue bonds, and the constitutional power to extend such aid to public corporations had been, in general, upheld by the State Courts.[1] Gradually, the extensive frauds committed by both the officers of municipalities and by officers of the railroads, the enormous loans made to corporations which failed to fulfill the objects for which the money was loaned or granted, produced a revulsion of feeling; counties, cities and towns entered on a course of repudiation, and State Courts reversed or overruled their previous judgments and denied the power of the Legislatures to authorize municipalities to issue such bonds. Such were the conditions, therefore, which existed, when, in 1864, the case of *Gelpcke* v. *Dubuque* came before the Court on appeal from a Circuit Court of the United States. The State Supreme Court of Iowa had, in many opinions from 1853 to 1859, sustained the validity of municipal bonds issued in aid of railroads; but in 1860, it had given an opinion overruling all the previous cases. Suit being brought on bonds issued by a city while the former State decisions prevailed, it was contended by counsel for the city that the Court must adhere to its established doctrine of following the latest construction of a State Constitution made by a State Court. But by adopting such a rule in these

[1] See especially description of these conditions by Judge Jeremiah S. Black in *Sharpless* v. *Mayor*, 21 Pa. St. 147; *Amer. Law Reg.* (1853), II; in *Ritchie* v. *Franklin County*, 22 Wall. 67, in 1875, Judge Davis referred to "the well known mania of the people to run in debt for public improvements."

cases, the Court would give countenance to repudiation, and would bring untold losses upon thousands of innocent bondholders who had invested their money on the faith of apparently established law. To deal with such a situation, the Court apparently had but three possible courses open to it; either to follow the latest State decisions; or to follow the earlier decision on the ground that it was, in fact, the "latest *settled* adjudication"; or to hold that the question was one of commercial law, and that in accordance with its decision in *Swift* v. *Tyson*, it would determine all such questions for itself regardless of the law of the State. Instead of following either of these courses, however, the Court decided the case on an entirely new ground; and in a noted opinion by Judge Swayne held that where a contract was valid by the law of a State as expounded by its Judiciary at the time it was made, it could not be impaired, either by subsequent action of a Legislature or decision of a State Court, and that this rule "rests upon the plainest principles of justice." While not unmindful of the importance of uniformity in the decisions of the Court, and those of the highest local Courts, "we shall never", he said, "immolate truth, justice, and the law, because a State tribunal has erected the altar, and decreed the sacrifice." And in later cases, it held that "such a rule is based upon the highest principles of justice." While it was difficult to reconcile this equitable doctrine with the duty imposed on Federal Courts by the Thirty-Fourth Section of the Judiciary Act to follow the laws of the State, and while from time to time the Court advanced varying grounds for its action,[1] nevertheless, it continued for the

[1] The Court's theory of impairment of obligation of contract by judicial decision was reiterated in *Olcott* v. *Supervisors*, 16 Wall. 678, in 1873, and *Township of Pine Grove* v. *Talcott*, 19 Wall. 666, in 1874, but was gradually abandoned until

next twenty years consistently to disregard opinions of the State Courts denying the validity of these municipal railroad aid bonds, to formulate its own commercial law on the subject and to discountenance every form of attempted repudiation of debt.[1] While the doctrine thus firmly asserted by the Court had an inestimable effect upon the material and moral prosperity of the country in restoring confidence in a class of securities which were an indispensable factor in the development of municipal and industrial enterprises, it became, on the other hand, a somewhat serious factor in the history of the relations of the Court to the American people. For owing to the pronounced feelings of hostility to the Federal Judiciary which these bond decisions aroused through the Central West, popular confidence in, and support of, the supreme tribunal were weakened, at the precise time when such confidence and support were especially needed. These bond decisions were rendered during the partisan and passionate contests which centered around Reconstruction legislation, and at the very period when the Court was being made the subject of

it was entirely repudiated in 1888 in *New Orleans Waterworks* v. *Louisiana Sugar Co.*, 125 U. S. 18, 30. See *Impairment of Contract by Judicial Decisions*, by Conrad Reno, *Amer. Law Rev.* (1889), XXXII. Prof. James B. Thayer upheld the decision on the ground that it was a rule adopted by the Court to shape its discretion in matters arising in the Federal Circuit Courts in suits based on diverse citizenship and involving the construction of State laws and Constitutions, and termed it a just and wholesome one. *The Scope of Gelpcke* v. *Dubuque*, *Harv. Law Rev.* (1891), IV; *ibid.* (1898), VIII.

[1] See *Municipal Corporations* (1874, 2d ed.) by John F. Dillon, sec. 416; *The Rule in Gelpcke* v. *Dubuque*, by John M. Read (Chief Justice of Pennsylvania), *Amer. Law Rev.* (1875), IX; *Railroad Aid Bonds in the Supreme Court*, by James F. Mister, *Amer. Law Reg.* (1878), N. S., XVII; *Statutory Powers in Bond Cases*, *ibid.* (1881), N. S., XX; *Municipal Bonds*, by Frank W. Hackett, *Harv. Law Rev.* (1891), V; see also *Law of Municipal Bonds*, in *Southern Law Rev.* (1876), N. S., II; (1881), VII: "The Supreme Court has upheld the right of holders with a strong hand, and has set a face of flint against repudiation, even when made on legal ground deemed solid by the State Courts, by municipalities which had been deceived and defrauded. That such securities have any general value left is largely due to this course of adjudication and to the reliance felt by the public that it will stand firmly by its doctrines."

most violent attacks in Congress and in the press. That the Court had taken a position in the bond cases which must bring it into disfavor with large portions of the public had been predicted at the outset by Judge Miller, in his strong dissenting opinion in the *Gelpcke Case*; and the fulfillment of his prophecy was seen in the numerous clashes which ensued during the next thirty years, and which resulted in bringing before the Court for its decision during that period approximately three hundred municipal bond cases — a larger number than on any other subject presented for its consideration.[1]

[1] Judge Davis said in *Thomson* v. *Lee County*, 3 Wall. 327, in 1866: "There is hardly any question connected with this species of securities that has not been discussed and decided by the Court." This statement showed curiously little appreciation of the troubles that were to face the Court, since in succeeding years the Court had before it about three hundred cases involving such bonds. Of these cases, sixty-five arose in Illinois; fifty in Missouri; twenty-five in Iowa; twenty-two in Kansas; eighteen in Wisconsin; fourteen in New York; eleven in Indiana; nine each in Kentucky and Tennessee; the others being scattered over eighteen States; none, however, arising in New England.

CHAPTER THIRTY-TWO

THE SLAUGHTERHOUSE CASES AND THE DEATH OF CHASE

1873

As the preceding chapters have shown, the period of Chase's Chief Justiceship had constituted an era of Nationalism, and the pronounced trend of the Court was significantly noted at this time in a review of the first digest of decisions of the Federal Courts: "The great increase in the strength and influence of the Federal Government, which has been the natural consequence of the triumph over a gigantic rebellion, is nowhere more clearly evinced than in the enhanced interest felt by the Bar of the whole country in the decisions of the Federal Courts . . . or in the newly felt importance of the Federal Judiciary."[1] With the year 1873, however, there came a distinct reaction from this extreme Nationalism. That the Court from 1870 to 1873 was receding somewhat from the almost unvaried support which it had theretofore given to Congressional power had been seen in the increased instances in which it had exercised its function of declaring Federal legislation to be violative of the Constitution. While in the eighty-one years from 1789 to 1869, only four Acts of Congress had been declared invalid, in the four years from 1870 to 1873, six of such Acts were held unconstitutional.[2] Signs of a reaction in favor of the State

[1] *Western Jurist*, II, 319, review of *Brightly's Digest*.

[2] *Marbury* v. *Madison* (1803), 1 Cranch, 137; *Dred Scott* v. *Sandford* (1857), 19 How. 393; *Gordon* v. *United States* (1865), 2 Wall. 561; *Ex parte Garland* (1867), 4 Wall. 333; *Hepburn* v. *Griswold* (1870), 8 Wall. 603; *United States* v. *De Witt*

powers had appeared as early as 1870, when, two months after the first *Legal Tender Case* decision, the Court upheld, in *Thomson* v. *Union Pacific R. R.*, 9 Wall. 579, the right of a State to tax the property of a railroad even when built with Government money and acting as a Government agency. Attorney-General Hoar had argued eloquently against such an interference, saying: "It is a military, postal and commercial road and came out of the throes of the rebellion. It was designed to promote the unity and indivisibility of our people . . . a work which more than any other ever undertaken by the Government tends to consolidate peace and to maintain the dignity and reflect the glory of the nation." The Court, however, by Chief Justice Chase, held that while taxation of the agency is taxation of the means employed by the Government, "there is a clear distinction between the means employed by the Government and the property of agents employed by the Government. . . . Taxation of the agency is taxation of the means; taxation of the property of the agent is not always, or generally, taxation of the means." In the absence of interposition by Congress to protect this property from State taxation, it held that it must be assumed that the State power to tax was not being employed so as to defeat or hinder the operation of the National Government.[1]

Another sign of reaction came in 1871, when, one month before the second *Legal Tender Case* decision, the Court had occasion, in *Collector* v. *Day*, 11 Wall. 113,

(1870), 9 Wall. 41; *Justices* v. *Murray* (1870), 9 Wall. 274; *Collector* v. *Day* (1871), 11 Wall. 113; *United States* v. *Klein* (1872), 13 Wall. 128; *United States* v. *B. & O. R. R.* (1873), 17 Wall. 322.

[1] See *Union Pacific R. R.* v. *Peniston*, 18 Wall. 5, decided Dec. 15, 1873, in which the same decision was made as to a railroad chartered by Congress; see *United States* v. *Union Pacific R. R.*, 91 U. S. 72; *United States* v. *Burlington & Mo. River R. R.*, 98 U. S. 334; *Platt* v. *Union Pacific R. R.*, 99 U. S. 48; *Union Pacific R. R.* v. *United States*, 99 U. S. 402; *Union Pacific R. R.* v. *United States*, 104 U. S. 662; *Union Pacific R. R.* v. *United States*, 117 U. S. 355.

to consider the right of Congress to impose in time of war an income tax on the salary of a State judicial officer. It had held that the sovereignty of a State could not thus "be crippled, much less defeated by the taxing power of another Government. . . . The exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government." This decision, said the *Cincinnati Enquirer*, "that the States have rights which are as sovereign as those of the General Government, and that the maintenance of their political dignity and sovereignty is as essential to good order and the perpetuity of free institutions as is the maintenance of the political dignity and sovereignty of the Federal Government, knocks the pins from under the trestle work the Republicans have been erecting, and over which they hoped to march the people from a land of freedom to one of despotism." [1]

It was with the decision of the famous *Slaughterhouse Cases*, 16 Wall. 36, in 1873, however, that the change in the attitude of the Court became most marked. In these cases, the Court, in construing for the first time the scope of the Fourteenth Amendment, rendered a decision which profoundly affected the course of the future history of the country.

Though the Amendment had been proclaimed to be in force July 28, 1868, nearly five years had elapsed before the question of its construction had been presented for determination by the Court.[2] These *Slaugh-*

[1] *Cincinnati Enquirer*, May 6, 1871; *New York World*, May 2, 11, 1871; the *New York Tribune*, April 29, May 3, 1871, attacked the decision.

[2] See 10 Wall. 273, in 1870, when the Court considered in the *Slaughterhouse Cases*, the effect of a writ of error as a supersedeas. The first case in which the applicability of this Amendment was urged was *Worthy* v. *Commissioners*, 9 Wall.

terhouse Cases had been pending since 1870; they had been argued in January, 1872, but as Judge Nelson was absent,[1] and as there was a division of opinion among the Judges, they were argued again, on February 3, 4, 5, 1873, with supreme ability by John A. Campbell against Matt H. Carpenter and Thomas J. Durant, Jeremiah S. Black and Charles Allen.[2] The facts in these cases presented a situation which clearly called for relief, if the Federal Courts had any power to grant it. The "carpet-bag" Legislature of Louisiana, undoubtedly under influence of corruption and bribery, had passed a statute which granted a monopoly of the slaughterhouse business within certain parishes of New Orleans in favor of one corporation, and which deprived over one thousand persons of the right to engage in that business. There had been a general feeling of outrage throughout the community, and the right of a State to establish such a monopoly was vigorously challenged.[3] Theretofore, the legal questions presented would have been purely of State concern and for exclusive decision by the State Courts. Now, it was contended by the opponents of the monopoly that rights guaranteed by the Fourteenth Amendment had been violated by the State statute, and that it not only abridged the privileges and immunities of citizens of the United States,

611, but the Court on Feb. 7, 1870, held that the point was not properly claimed in the State Court and dismissed the case for lack of Federal jurisdiction appearing in the record.

[1] Judge Nelson resigned Nov. 28, 1872, at the age of eighty and after twenty-seven years' service on the Court (see 14 Wall. ix). To succeed him, President Grant was urged and expected to appoint a Judge from the South, either Thomas J. Durant of Louisiana or Judge Duvall of Texas; he was also urged to appoint William M. Evarts of New York (*Harper's Weekly*, Dec. 14, 1872); but he finally appointed Dec. 11, 1872, Ward Hunt of New York, a man sixty-two years of age, and a Judge of the New York Court of Appeals.

[2] Campbell had appeared before the Court for the first time since his resignation, in *Waring* v. *Mayor*, 8 Wall. 110, on Oct. 12, 1869. As to his part in the *Slaughterhouse Cases*, see especially *John Archibald Campbell* (1920), by Henry G. Connor.

[3] See *Reconstruction in Louisiana after 1868* (1918), by Ella Lonn.

but deprived them of their property without due process of law, and denied to them the equal protection of the laws; it was further argued that it constituted an involuntary servitude, in violation of the Thirteenth Amendment. Two months after the second argument, the opinion of the Court was rendered by Judge Miller, on April 14, 1873, Judges Clifford, Davis, Strong and Hunt concurring. It stated that it was "impressed with the gravity of the questions raised", and recognized the "great responsibility" of the decision; that "no questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States and of the several States to each other, and to the citizens of the States and of the United States, have been before this Court during the official life of any of its present members" (*i.e.* since 1858). After considering the history of the Fourteenth Amendment, the evil which it was designed to remedy, and its "pervading spirit", the Court held that the Louisiana statute did not violate the Amendment in any particular; that if the right claimed by the plaintiff to be freed of monopoly existed, it was not a privilege or immunity of a citizen of the United States as distinguished from a citizen of a State; that the Amendment, in defining a citizen of the United States, did not add any additional privileges and immunities to those which inhered in such citizens before its adoption, that it was only rights which owed their existence to the Federal Government, its National character, its Constitution or its laws, that were placed under the special care of the National Government; that it was not intended to bring within the power of Congress or the jurisdiction of the Supreme Court, "the entire domain of civil rights heretofore belonging exclusively to the States"; and

that to hold otherwise would "constitute this Court a perpetual censor upon all legislation of the States on the civil rights of their own citizens." [1] Such, very briefly stated, was this momentous opinion. That the decision, so far as it concerned the provision of the Amendment forbidding the States to abridge the privileges and immunities of a citizen, rendered that clause a practical nullity, was pointed out by the dissenting Judges (Field, Swayne, Bradley and Chief Justice Chase). The construction given by the majority of the Court made of this clause, they said, "a vain and idle enactment which accomplished nothing, and most unnecessarily excited Congress and the people on its passage"; for "with privileges and immunities pertaining only to citizens of the United States *as such*, no State ever could have interfered by its laws", and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and laws of the United States always controlled any State legislation of that character, even before the Fourteenth Amendment. Accordingly, the dissenting Judges were of opinion that the Amendment must be given such a construction as to render it of some effect; and they held that the monopoly was a "flagrant and indefensible violation of the rights of many for the benefit of a few"; that grants of exclusive privileges of this kind were "opposed to the whole theory of free government and it requires no aid from any bill of rights to render them void", and that a right of a citizen had been vio-

[1] "The privileges of American citizenship on American soil, as distinguished from those of State citizenship, were hardly thought of until the Civil War had done its nationalizing work. They would have remained largely a matter of sentiment then, had it not been for the new conditions and controversies precipitated by the enfranchisement of the colored race. By fundamental alterations in our Constitution, they have acquired a new dignity and power; but their ultimate range and scope have been left for the future to determine, by the slow growth of National institutions." *The Citizens of the United States*, by Simeon E. Baldwin, *Yale Law Journ.* (1893), II, 83; *Maxwell* v. *Dow* (1900), 176 U. S. 581.

lated which was entitled to protection under the Amendment. "By the Constitution, as it stood before the War," said Judge Swayne, "ample protection was given against oppression by the Union, but little was given against wrong and oppression by the States. That want was intended to be supplied by this Amendment. Against the former this Court had been called upon more than once to interpose. Authority of the same amplitude was intended to be conferred as to the latter. But this arm of our jurisdiction is, in these cases, stricken down by the judgment just given."

"The decision was given to an almost empty Court-room and Bar," wrote a Washington correspondent, the next day, "and has as yet attracted little attention outside of legal circles, although the Judges of the Court regard the case as the most important which has been before them since the Dred Scott decision. The opinion of Mr. Justice Miller is held by the Bar to be exceedingly able, while passages in it were regarded as striking examples of judicial eloquence." [1] It was but a short time, however, before the Bar and the general public began to realize the immense scope of the decision. To the Radical Reconstructionists it came as a tremendous shock and disappointment; for their intent in framing the language of the Amendment was directly contrary to the narrow construction now placed upon it by the Court. Though the country at large may not have understood, at the time of the passage of the Fourteenth Amendment, the full purpose of its very general phraseology, the Radical leaders in Congress had had very definite ideas in drafting and submitting it to the people. Not only did they desire punishment of the South (to be achieved through the second, third and fourth sections, which were easily understood by the people) and

[1] *Boston Daily Advertiser*, April 16, 1873.

the elevation of the negro to the plane of equality with the white man (which was to be achieved by section five, as well as by the Thirteenth and Fifteenth Amendments), but they also intended, by section one, to centralize in the hands of the Federal Government large powers, hitherto exercised by the States. The interval between the adoption of the Thirteenth Amendment and the proposal of the Fourteenth had been marked by legislation in the Southern States, designed, under the guise of repressing vagrancy and regulating contracts of employment, to keep the negroes in a state of subjection; and in order to gain control over the negro situation in the South, wide extension of Federal power, and withdrawal of power previously vested in the States, were deemed necessary. As has been said: "They desired to nationalize all civil rights; to make the Federal power supreme; and to bring the private life of every citizen directly under the eye of Congress. This intention of the Radicals, though too much involved for the people in general to comprehend, was quite generally understood by the leading editors in the North and in the South and by the party leaders on both sides." [1] The feelings of those Republicans who had taken part in framing the Amendment were clearly shown by their comments on the decision. Senator George S. Boutwell, who had been a member of the Committee on Recon-

[1] *The Fourteenth Amendment and the States* (1912), by Charles Wallace Collins, 45. Prof. John W. Burgess said in *Political Science and Constitutional Law* (1890), I, 325: "They intended to occupy the whole ground, and thought they had done so. The opposition charged that these Amendments would nationalize the whole sphere of civil liberty; the majority accepted the view; and the legislation of Congress for their elaboration and enforcement proceeded upon that view." See *39th Cong., 1st Sess.*, 2530–2542. James G. Blaine in his *Twenty Years of Congress* (1884–1886), II, 419, said that by the decision "the Amendment has been deprived, in fact, of the power which Congress intended to impart to it."

See *The Adoption of the Fourteenth Amendment*, by Horace Edgar Flack (1908); *The Fourteenth Amendment* (1898), by William D. Guthrie; *Contemporary American History* (1914), by Charles A. Beard; *The Fourteenth Amendment and the Slaughterhouse Case*, by William L. Royall, *Southern Law Rev.* (1879), N. S., IV, 558.

struction, said that the Court had "erred in holding that there were two classes of rights, National and State." Senator Timothy O. Howe declared that "the American people would say, as they had said about the Dred Scott decision, that it was not law and could not be law." Senator Roscoe Conkling stated that the Drafting Committee had intended to include within the scope of the Amendment, not only the negro struggling upward from bondage, but also corporations and business interests struggling for emancipation from legislative interference. Senator George F. Edmunds, who also took part in framing the Amendment, said later: "There is no word in it that did not undergo the completest scrutiny. There is no word in it that was not scanned, and intended to mean the full and beneficial thing it seems to mean. There was no discussion omitted; there was no conceivable posture of affairs to the people who had it in hand which was not considered. And yet it was found upon the first attempt to enforce its first clause . . . that the Court, by a division of five to four, radically differed in respect both to the intention of the framers and the construction of the language used by them."

Those Radical Republicans, who opposed the decision from a partisan standpoint, were joined in their denunciation by a large number of Democrats, more especially in the West, who, though sympathizing with the views of the Court in regard to the relations of the Nation and the States, nevertheless deplored the decision from an economic and social standpoint, in the support which it gave to State-created monopolies. Typical of this form of critic was the *Cincinnati Enquirer*, which feared that the "degeneracy of the Court" was displayed by this decision upholding "a law passed by a so-called Legislature, elected by the bayonet and

through the agency of the most degraded and ignorant portion of the population . . . to reward particular favorites. . . . We are astonished at this decision of the Court for which hitherto we have had the greatest respect. We could not have believed it possible that they could have had any hesitancy as to their duty. . . . It gives a legal sanction to the consummation of an outrage on individual rights that is almost unparalleled. It seems to us that, in view of the alarming precedent which has been set, the Court cannot maintain its opinion, but must recede from it. It is truly the monopolists' decision." It pointed out that the Fourteenth Amendment, originally designed for oppressing the Southern people, was now, as construed by the Court, only shelter for fraud and outrage, and not only "powerless for good, but powerful to harm." The opinion, it said, "will create a prejudice against the continued existence of a tribunal that has such little regard for the interests of the public. Not since the war, nor during it, was there so dangerous a precedent established as by this decision, which gives to a political body the authority to create monopolies of a few persons to tyrannize over and rob the many, forever." [1] The *Southern Law Review* also assailed the Court for sustaining a "menacing monopoly created by a corrupt and ignorant carpet-bag State Government."

Opinions of this nature, however, were not generally shared; for it was seen by most of the press and by the Bar that the decision did not, in reality, sanction monopolies, but simply established the proposition that the subject of local monopoly was for the States to deal with and not for the Federal Government; [2] and this was un-

[1] *Cincinnati Enquirer*, April 16, 17, 1873; *The Slaughterhouse Cases, Southern Law Rev.* (1874), III; *The Fourteenth Amendment, ibid.* (1878), N. S., IV.

[2] The *Chicago Tribune*, April 18, 19, 1873, said: "The decision of the Court, while it indirectly sustains this monopoly, does not turn upon this point. The ques-

doubtedly in accord with the temper of the times. The country was tiring of the extensions, and, in some circumstances, usurpations of Federal power which had been the natural outcome of war and of war necessities. The decision marked the end of the great centralizing, Nationalistic movement, and the beginning of a reaction towards the enhancement of the powers of the States. "It is important," said the *Nation*, "as showing that the Court is recovering from the war fever and is getting ready to abandon sentimental canons of construction." [1] "No one for a moment can suppose that the Amendments were ratified with any such revolutionary purpose," said the *Independent;* and the *New York World* said that the gist of the question before the Court was "whether those Amendments had changed the previous relations of the States to the Federal Government. The Court very properly decided that they had not. . . . Nothing is clearer than that the new Amendments, fairly interpreted, leave all the broader relations between the States and the Federal Government unchanged and untouched. . . . The joint design of them all was to bleach the negro into a political white man, to raise the African to the level of the Caucasian in his civil and political rights. . . . Such suits would never have been thought of, if certain shallow people had not gone crazy about the scope of the Fourteenth Amendment. There is no limit to the follies which have clutched at that Amendment for support. The

tion of monopoly was not before the Court at all, as is assumed by the *Missouri Democrat* and some other journals."

[1] *Nation*, April 24, 1873; *Independent*, May 22, 1873; *New York World*, April 16, 1873; *New York Times*, April 16, 1873; *Boston Daily Advertiser*, April 17, 1873; *Philadelphia Press*, April 17, 1873; *Chicago Tribune*, April 18, 19, 1873. William L. Royall in *Southern Law Review* (1878), N. S., IV, said: "The truth is that when this Amendment came before the Court for construction, the minds of patriotic men were filled with alarm at the centralizing tendency of the government . . . and those who wish well to their country looked with sorrowing eyes upon the prospect that the ancient landmarks of the States were to yield before the advancing strides of our imperial despotism."

women's-rights people have claimed that it ordains female suffrage. A Chicago she-attorney claims 'that it admits her to the Bar.' Certain New Orleans butchers assert that it gives them the right to land and slaughter animals in any part of that city they please. But the Supreme Court has decided, really, but too falteringly, that its only legal effect is to make full-fledged citizens of negroes, but leaving the government of the country in all other respects precisely the same as if the Constitution had stood as first adopted, and no negro had ever left his native Africa. . . . That the Court did not strike a bolder note in declaring this sound doctrine is to be accounted for by their consciousness that they were running counter to the impetuous hostility of the Republican party to the constitutional rights of the States." The *New York Times* said that it was "calculated to throw the immense moral force of the Court on the side of rational and careful interpretation of the rights of the States and those of the Union. It is calculated to maintain, and to add to the respect felt for, the Court, as being at once scrupulous in its regard for the Constitution and unambitious of extending its own jurisdiction. It is also a severe, and we might almost hope a fatal, blow to that school of constitutional lawyers who have been engaged, ever since the adoption of the Fourteenth Amendment, in inventing impossible consequences for that addition to the Constitution." The *New York Tribune* termed it "a most important decision", and said that it "set up a barrier against new attempts to take to the National Government the adjustment of questions legitimately belonging to State tribunals and Legislatures." The *Philadelphia Press* said that it would "clear away a tolerably dense legal fog"; and the *Boston Advertiser* said that a contrary decision "would constitute this Court a perpetual censor

upon all State legislation concerning the rights of its citizens. A doctrine so subversive of ancient and fundamental principles cannot be set up, unless by language too plain to be capable of any other interpretation." The *Chicago Tribune* said that the decision plainly indicated two things: "That the Court will not construe the Constitutional Amendments as upsetting State Governments; and that the people of every State must look to their own protection against monopolies, when they frame their Constitution and elect their Legislatures, and not come to the Courts afterwards and ask them to undo what the Legislative authority has done." Of the soundness of the decision, it said that there could be no doubt: "The Constitutional Amendments, beyond their estoppel of the States from enslaving the negro or depriving him of the privilege of the elective franchise and the other rights of white men, cannot interfere with State-Rights. Any other interpretation of these Amendments would be glaringly in conflict with historical facts. . . . The Federal Government thus becomes absolute in its jurisdiction, and State Governments only exist or exercise their powers by its suffrance. . . . The principal value of this decision grows out of the fact that it clearly and unmistakably defines the province of the Constitutional Amendments, and will hereafter put a quietus upon the thousand and one follies seeking to be legalized by hanging on to the Fourteenth Amendment. . . . The decision has long been needed, as a check upon the centralizing tendencies of the Government and upon the determination of the Administration to enforce its policy and to maintain its power, even at the expense of the constitutional prerogatives of the States. The Supreme Court has not spoken a moment too soon or any too boldly on this subject."

Sentiments like these, widely expressed in the North, the East and the West, afford an interesting illustration of how far the pendulum had swung away from centralization and towards the most extreme State-Rights views held by the Democratic Party before the war.

An opinion similar to that of the daily press was also held by the *American Law Review*, which said: "In its results it is of untold importance to the future relations of the different members of our complex system with the whole. The line which separates the Federal Government from the States, and which of late years has trenched on what are called the reserved rights of the latter, was never so precisely defined as to make trite or tiresome new descriptions of its position; and the interpretation of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States, which was called for by attempts to apply their letter, if not their spirit, to new states of fact not contemplated by the Congress nor the Legislatures that made them, is the latest and one of the most important acts of government, growing out of the war. It is noteworthy that, while the Executive Department keeps Casey in New Orleans, and sends its soldiers to regulate the internal politics of Louisiana, the Judicial Department remits to the people of that State, to its Courts and Legislature, the custody of the privileges and immunities of its citizens." [1]

The development of the law since the date of this great decision has, on the whole, justified its wisdom, and Judge Miller's opinion has justly been regarded as one of the glorious landmarks of American law. The defeated counsel, John A. Campbell, in after years, admitted that it was "probably best for the country that the case so turned out"; and another Southerner,

[1] *American Law Review* (July, 1873), VII, 732.

John S. Wise, said at the celebration of the Centennial of the Court: "That decision did more than all the battles of the Union to bring order out of chaos. . . . When war had ceased, when blood was stanched, when the victor stood above his vanquished foe with drawn sword, the Supreme Court of this Nation planted its foot and said: This victory is not an annihilation of State Sovereignty but a just interpretation of Federal power." Finally, the words of Judge Moody, in 1908, may well be quoted: "Criticism of the case has never entirely ceased, nor has it ever received universal assent by members of this Court. Undoubtedly, it gave much less effect to the Fourteenth Amendment than some of the public men active in framing it intended, and disappointed many others. On the other hand, if the views of the minority had prevailed, it is easy to see how far the authority and independence of the States would have been diminished, by subjecting all their legislative and judicial acts to correction by the legislative and review by the judicial branch of the National Government." [1]

Had the case been decided otherwise, the States would have largely lost their autonomy and become, as political entities, only of historical interest. If every civil right possessed by a citizen of a State was to receive the protection of the National Judiciary, and if every case involving such a right was to be subject to its review, the States would be placed in a hopelessly subordinate position; and the ultimate authority over the citizens of the State would rest with the National Government. The boundary lines between the States and the National Government would be practically abolished, and the rights of the citizens of each State would be irrevocably

[1] *Twining* v. *New Jersey* (1908), 211 U. S. 78; see also *Samuel Freeman Miller*, by Horace Stevens, *Great American Lawyers* (1908), VI.

fixed as of the date of the Fourteenth Amendment, without power in the State to modify them, and with power in the Supreme Court of the Nation to review any State statute asserted to be in violation of such rights, even if such statute affected solely a matter of State policy. Inasmuch as about eight hundred cases have been before the Court since 1873, involving State statutes under the due process clause of the Fourteenth Amendment, it is impossible to conceive of the amount of litigation on which that Court would have been called to pass, if State legislation involving every possible civil right of a State citizen could also have been brought before it under the privilege and immunity clause.[1]

Though the case presented two other questions arising under the Fourteenth Amendment — whether the State legislation deprived the plaintiffs of life, liberty and property without due process, and whether it denied them equal protection of the laws, — the Court's opinion gave to these points very slight attention. As to the first point, the Court simply said: "The argument has not been much pressed. . . . It is sufficient to say that under no construction of that provision that we have

[1] "Never was the Court truer to itself, truer to the Constitution." *Politics and the United States Supreme Court*, by Walter D. Coles, *Amer. Law Rev.* (1893), XXVII.

On the other hand, the opposite view has been expressed by Prof. John W. Burgess in *Political Science and Constitutional Law*, I, 228–230. Writing in 1890, he termed it "an ominously important decision. . . . Coming at the time when the reaction had begun to set in against the pronounced Nationalism of the preceding decade, it partook of the same, and set the direction towards the restoration of that particularism in the domain of civil liberty, from which we suffered so severely before 1861, and from which we are again suffering now. From whatever point of view, I regard the decision . . . from the historical, political, or juristic, it appears to me entirely erroneous. It appears to me to have thrown away the great gain in the domain of civil liberty won by the terrible exertions of the nation in the appeal to arms. I have perfect confidence that the day will come, when it will be seen to be intensely reactionary and will be overturned." See also *Judicial Constitutional Amendment*, by Frederic R. Coudert, *Yale Law Journ.* (1904), XIII; and see Everett V. Abbott, who says in his *Justice and the Modern Law* (1913), that the *Slaughterhouse Case* was "obviously erroneous, and we may safely conclude that it would not be rendered today."

ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision." In view of later decisions of the Court relative to the extent of the State police power over liberty and property, it may well be doubted whether the decision might not have been otherwise, had the case been argued more fully on the point of due process and had the facts been more clearly stressed; for one of the dissenting Judges, Field, always insisted in subsequent cases, that the question whether the statute involved had any real relation whatsoever to the police power had not been properly presented or considered. As to the other point argued in the case, the Court held that the Amendment grew out of the negro question and was to be interpreted as dealing almost solely with it. "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision," said Judge Miller. It is interesting to note that this prediction has been utterly falsified; since the protection granted by this clause of the Amendment has been sought by litigants almost wholly in cases involving social and economic State legislation, and very seldom in cases presenting discrimination against negroes.

A particularly fortunate circumstance in the decision of this case was the fact that no criticism could be based on the political or sectional attitude of the Judges. For the Democrat, Judge Field, and the Republican, Chief Justice Chase, both of whom were of the moderate State-Rights school, were joined by the pronouncedly Nationalistic Republican Judges, Bradley and Swayne,

in delivering the minority opinion directed against the power of the State; while in favor of the State authority were found three Republicans, Judges Miller, Strong and Hunt, Judge Clifford, a Democrat, and Judge Davis whose political views were tending towards the Democracy.

A practical application of the doctrine of the *Slaughter-house Cases* was made in another case decided at the same time at this Term, *Bradwell* v. *The State*, 16 Wall. 130, in which a refusal of the Supreme Court of Illinois to license a woman to practice law was held not to violate the Fourteenth Amendment, inasmuch as the right to practice law in a State Court was not a privilege or immunity of a citizen of the United States as that term was construed by the Court. Judge Bradley (Swayne and Field concurring) agreed with the result but not with the grounds of the decision, saying (in language probably unacceptable to the women suffragists) that every citizen was not qualified for every calling, and hence that "in view of the peculiar characteristics, destiny and mission of women, it is within the province of the Legislature to ordain what offices, positions and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex." [1]

[1] The *Nation* said, April 24, 1873: "It is a rather ludicrous illustration of the character of the woman movement that a prominent female agitator should have seized the opportunity to prove the fitness of her sex for professional life, by taking for her first important case one which she must have known the Court would decide against her, unless she supposed that they were likely to be influenced by personal solicitation and clamor, or else that they were all gone crazy." The *Boston Daily Advertiser*, April 16, 1873, said: "Judge Bradley's opinion seemed to cause no little amusement upon the Bench and on the Bar." See also *Death of Myra Bradwell, Amer. Law Rev.* (1896), XXX, 254.

In 1877, the Supreme Court of the United States denied the application of a woman lawyer, Mrs. Belva A. Lockwood, for admission to practice as an Attorney in that Court, the Chief Justice saying, Nov. 6, that he had been instructed by the Court to announce the following decision: "By the uniform practice of the Court,

Two weeks after participating in these momentous decisions, and on the last day of the Term, Chief Justice Chase delivered an opinion in another case, *Osborne* v. *Mobile*, 16 Wall. 479, which again marked the tendency towards a reaction in favor of the State Sovereignty now apparent in the Court; and in upholding a State license tax on express companies doing business partly outside the State, the Chief Justice said that, while it was always difficult to draw the line as to unconstitutionality, "it is as important to leave the rightful powers of the State in respect to taxation unimpaired as to maintain the powers of the Federal Government in their integrity" — a sentiment which should have gratified the strongest believer in the upholding of State-Rights by the Court.[1]

Ten days later, Chase died suddenly, on May 7, 1873. For over two years, he had been in feeble health, due to a paralytic shock. He had served for eight years, through a notable period filled with political passions, in which only the most determined and rugged honesty of mind and purpose could have held the Court to the courageous course which it had pursued. "The nine annual Terms through which he has presided constitute a judicial period of little less importance than that period of constitutional interpretation which it was the

from its organization to the present time, and by the fair construction of its rules, none but men are admitted to practice before it as attorneys and counsellors. This is in accordance with immemorial usage in England, and the law and practice in all the States until within a recent period; and the Court does not feel called upon to make a change, until such a change is required by statute, or a more extended practice in the highest Courts of the States." The result of this was the enactment by Congress of the Act of Feb. 15, 1879, making women eligible for admission to practice. See *Amer. Law Rev.* (1877), XI, 367.

[1] George W. Julian in his *Political Recollections* (1884), said: "After the Presidential election (1872), I went to Washington where I met Chief Justice Chase in the Supreme Court and accepted an invitation to dine with him. He looked so wasted and prematurely old, that I scarcely knew him. He was very genial, however, and our long political talk was exceedingly enjoyable. It seemed to afford him much satisfaction to show me a recently reported dissenting opinion of his, in which he reasserted his favorite principle of States'-rights."

fortune of Chief Justice Marshall to fill," said the *Nation*, in a very just summary of his work. "For many years to come, the decisions of these nine Terms will be referred to by lawyers, legislators and constitutional students more than any others. In them, the late Chief Justice will always appear prominent and never far from right. He brought to the Court no store of legal learning, but he brought comprehensive views, considerable power of generalization and a just sense of constitutional rights and judicial responsibility . . . firm, liberal, and just; and his judicial services will be more highly esteemed when it is more clearly perceived that they uniformly tend to the maintenance of those principles which are the basis of National integrity, personal or political." "Mr. Chase was an ambitious man; he wished to please people and to gain their support, but he would not sacrifice to this object one jot of his convictions," said the *Independent*.[1]

At the opening of the Court on October 23, 1873, resolutions of the Bar were presented, to which Judge Clifford made a noble response. In view of the many political attacks which had been made upon Chase, Clifford's comment is of peculiar interest: "From the first moment he drew the judicial robes around him, he viewed all questions submitted to him as a Judge in the calm atmosphere of the Bench, and with the deliberate consideration of one who feels that he is determining issues for the remote and unknown future of a great people." He spoke especially of the "candor and self control" which enabled him, over the "pride of opinion", to change his views on the subject of legal tender.

It was generally supposed that Chase's successor would be chosen from six men, Benjamin R. Curtis,

[1] *Nation*, May 15, 1873; *Independent*, May 15, 29, 1873. See also *Chief Justice Chase*, by Isaac F. Redfield, *North Amer. Rev.* (April, 1876), CXXII.

William M. Evarts, E. Rockwood Hoar, Lyman Trumbull, William B. Groesbeck or Judge Miller. The latter's appointment would have especially pleased the country; for not only did he possess one of the ablest judicial minds, but his breadth of view and sturdy common sense had particularly commended him.[1] Many papers, like the *Chicago Tribune*, urged the President to appoint such a man as Evarts, to select a jurist from the ablest and most distinguished lawyers, and "to disregard paltry considerations of locality or party service." President Grant, however, after a delay of six months, finally offered the position to his close personal friend and supporter, Roscoe Conkling, the Senator from New York. Writing to him, November 8, 1873, he said: "When the Chief Justiceship became vacant, I immediately looked with anxiety to some one whose appointment would be recognized as entirely fitting and acceptable to the country at large. My own preference went to you at once." Conkling was hardly fitted for the position, either by the extent of his practice or the eminence of his legal acquirements; and probably wisely for his own reputation, he declined the honor.[2] Thereupon, December 1, Grant nominated his Attorney-General, George H. Williams of Oregon. The nomination surprised not only the whole Bar, but the whole country; and the *American Law Review* expressed the general feeling in a temperate article as follows: "Mr. Williams has, within a few years, been called to

[1] *Chicago Tribune*, May 8, 16, 1873; *Amer. Law Rev.* (1873), VII, 749, VIII, 159; *Independent*, May 29, 1873.

[2] *Life and Letters of Roscoe Conkling* (1889), by Alfred R. Conkling. *Harper's Weekly* looked more favorably on Conkling's legal attainments than did most of the Bar, saying, Dec. 13, 1873: "Senator Conkling, whose name is now oftenest mentioned in connection with the office, is forty-five years of age, and has quite as much reputation as a lawyer as either of the Chief Justices at the period of their appointment, and is probably a better speaker than any of them were at any period of their career." But see *Nation*, May 22, Oct. 2, 1873; *Independent*, Nov. 27, 1873, presenting a contrary view.

fill, in rapid succession, some of the most exalted places under our government; as a Senator, as a member of the Joint High Commission, and lastly, as the official head of the American Bar, he has had ample opportunity for the display of great talents, and in all these positions he has acquitted himself in such a manner as neither to invite distinguished praise, nor, except in the *Pacific Railroad Case*, to provoke much adverse criticism. If the public have seen in him, as yet, little to justify his selection for the high promotion with which the President has honored him, they have seen nothing to indicate that in his hands the dignity of his great office will be lowered or its powers used unworthily. Indeed, while it would be idle to deny that the nomination was a disappointment to all who had hoped that the seat of Marshall might be filled by a fitting successor, yet that disappointment was tempered by a sense of relief that the country had at least escaped the mortification of seeing in that honored place a man destitute alike of judicial temper and judicial experience, whose only claim to it was derived from active and unscrupulous service as a political partisan. Of Mr. Williams' judicial experience, there is little to say. He was born in 1823, and was admitted to the Bar in New York. Three years afterwards, in 1847, he was elected Judge of the first judicial district of Iowa, and in 1853, he was appointed Chief Justice of Oregon Territory, — an office which he held till 1857, when he declined a reappointment, as he then left the Bench to begin his political career. Such a training does not of necessity give that familiarity with questions of the class upon which the Supreme Court is called to pass, which we have been taught to consider desirable; but it is calculated at least to free the mind from narrowing local influences. We cannot conclude without expressing

our regret that the President, in making this, the most important appointment of his Administration, has not improved the opportunity to make such a choice from the eminent lawyers of the country as the people had a right to expect." "It is rather odd, it must be admitted," said the *Nation*, "that the chief of a Court which has to pass on the most complicated controversies of a great commercial country should be chosen from the Bar of a frontier State like Oregon. . . . Mr. Williams, if not able and learned, is laborious, painstaking and respectable; and as things go, his appointment will create a feeling of relief."

The comments of the press were apologetic, many frankly condemnatory, and all indicating clearly that the selection was not regarded as a fit one. "The general feeling of the public is that the President might and should have done better, with such names as Evarts, Cushing, Curtis, Hoar — to say nothing of the present members of the Supreme Court," said the *Independent*, and it expressed the hope that the Senate would refuse to confirm. "The country cannot afford to have any second-rate man, or any one whose qualifications are not beyond dispute, placed at the head of the Supreme Court." "The nomination surprised and disgusted every lawyer in the United States who has the honor of his profession at heart. It fell like a blow upon every respectable member of the Federal Judiciary," said the *Springfield Republican*.[1]

[1] *Amer. Law Rev.* (Jan., 1874), VIII; *Nation*, Dec. 4, 1873; *Independent*, Dec. 11, 25, 1873. Williams had only recently been defeated in the very important *Credit Mobilier Case*, in the Circuit Court in Connecticut, where he had argued against giants of the Bar like Benjamin R. Curtis, William M. Evarts and Sidney Bartlett. "The appearance made by Mr. Williams in this case was very unfortunate, and does not reconcile the Bar throughout the country to his nomination." *Nation*, Dec. 11, 1873; *Springfield Republican*, Jan. 2, 1874; *New York Herald*, Jan 4, 6, 1874, quoting press opinion through the country; *New York Tribune*, Jan. 2, 1874; *New York Evening Post*, Jan. 5, 1874. *Harper's Weekly* was at first favorable to Williams, see Dec. 20, 1873, Jan. 3, 1874.

George H. Williams himself in his *Reminiscences*, in *Yale Law Journ.*, VIII,

Within a week, the sentiment of the country and of the Bar had become so clearly that of protest that the Senate Judiciary Committee, which had at first reported favorably on the nomination, called back its report for further investigation. Williams himself, however, claimed that he had been viciously slandered, and his friends urged confirmation as a vindication. Nevertheless, it was reported in the newspapers that Senator Conkling was to propose a bill in the Senate to abolish the office of Chief Justice as a Presidential appointment, and to make it the duty of the Associate Judges to elect the presiding Chief Justice from their number — such a measure being deemed a happy expedient "to let Mr. Williams down gracefully and save the Republican party the blemish of a scandal." One Senator said that there was no need of a bill to abolish the Chief Justiceship, for the nomination of Williams had already done that. Finally, after the New York Bar Association had passed resolutions protesting the nomination, and stating that it "disappoints the just expectation of the legal profession and does not deserve the approval of the people, for the reason that the candidate proposed is wanting in those qualifications of intellect, experience and reputation which are indispensable to uphold the dignity of the highest National Court, and to maintain general respect for the law in the person of the officer who presides over its administration," [1] President Grant yielded, and, at Williams' own request, withdrew the nomination on January 8, 1874.

written in 1899, said: "I was favorable to the appointment of Justice Miller, but the President was unwilling to discriminate between the Judges on the Bench. . . . Conkling would have made a splendid Chief Justice. . . . The President nominated me without my knowledge or consent. . . . Suffice to say that the reasons for the Republican opposition to me in the Senate were not such as were given to the public by the newspapers."

[1] *New York Tribune*, Jan. 8, 1874, said it hoped the President had learned a lesson. The *New York Herald*, Jan. 7, 8, 1874, said that the President was immensely surprised at the unfavorable reception of Williams' nomination by the country.

Grant's next nomination for Chief Justice caused even more of a surprise and sensation; for on January 9, he nominated another close personal friend, Caleb Cushing. Unlike Williams, Cushing was a man pre-eminently qualified by legal attainments for the position. He had been Attorney-General of the United States, Judge of the Supreme Judicial Court of Massachusetts, and as a profound jurist, he probably excelled either Marshall or Taney or Chase; but he was a man of exceedingly unstable character, and in politics had been successively "a Whig, a Tyler man, a Democrat, a Constitutional Conservative in the confidence of Johnson, and a Republican." While vigorous both mentally and physically, he was, nevertheless, in his seventy-fourth year. His appointment appears to have been largely due to Grant's desire to recognize the services of the American counsel at the Geneva Arbitration, at the head of which had been Cushing and Evarts. While the nomination was objectionable to the Senate, still the completeness with which Cushing fulfilled the legal requirements of the office would probably have led to confirmation, had action been taken at once, even though the Radical Republican press violently protested against such action on this "incongruous" and "objectionable" nomination (as the *Tribune* termed it). "Simply because he is a familiar and serviceable friend, Gen. Grant proposes to place at the head of the Supreme Court, to decide upon questions involving the National sovereignty and the civil rights acquired by the war and consecrated by the late Amendments to the Constitution, a pro-slavery Democrat whose views have been notoriously in opposition to those by virtue of which the war was carried on"; [1] but,

[1] *New York Herald*, Jan. 10, 13, 15, 1874; *New York Tribune*, Jan. 10, 12, 13, 14, 15, 1874; *Harper's Weekly*, Feb. 7, 1874; *Nation*, Jan. 15, 1874.

it added caustically: "The fear of a worse thing may induce the Senate to accept this." So too, the *Nation* said that while admitting that Cushing stood in the front ranks for legal ability and learning, "the President has at last entered the small circle of eminent lawyers, and then with great care has chosen the worst man in it. His entering the circle was a result of the public feeling caused by the appointment of an utterly unfit man of doubtful reputation like Williams; his selection of Mr. Cushing, a consequence of his fixed policy of making public appointments on private considerations. As to Mr. Cushing, it may be said on the one hand, that he is past the age at which the law contemplates a Chief Justice retiring, is of a crafty nature and erratic temperament, and more renowned for shrewdness and learning than respected for talents and integrity; on the other hand, he is more active in body and mind than many a man of half his years, and like Chief Justice Taney may live to be eighty-eight. . . . We believe that it would be found, if the truth were known, that a good deal of the favor with which the nomination was at first received at Washington was due to the fear felt by those who are behind the scenes, that, if he was rejected, a worse man might be produced."

Before the Senate acted, a curious turn of fortune supplied it with an excuse for rejection. Some years previous, the Government had purchased from a Confederate agent, who had fled to Canada, three trunks of Confederate official documents, many of which had been found useful in defense of suits brought by alleged loyal men in the South on claims against the Government. Among these papers, there now was found a letter written by Cushing to Jefferson Davis, as President of the Confederacy, on March 21, 1861, recommending to his attention a young man who was then returning to

Texas. It was a simple, friendly letter and contained no proof of disloyalty on Cushing's part, nor could there be any doubt whatever of Cushing's full sympathy and action with the Union cause, throughout the war. But this letter, "an astounding development" as it was termed, afforded sufficient ground for an outcry against his confirmation;[1] and Grant was forced to withdraw the nomination, on January 13. That Cushing would have made an able Chief Justice was the opinion of Charles Sumner, who supported him and who wrote, January 15, the following interesting commentary:[2]

I should never have nominated or recommended Cushing as Chief Justice, but I was called to consider, his name being before the Senate, if I could vote for his rejection. Now, I know him well, having seen him for the last ten years constantly; and I know his positions on questions in which I am deeply interested. I trust him absolutely, and believe, if the occasion had occurred, he would have vindicated our ideas judicially far better than any probable nominee of Grant. I do not talk in the dark, for I have talked with him on these questions and have seen his sympathy with me. You know that I do not cherish old differences and animosities. How many have I seen advanced to the front who were once bitterly the other way! Knowing Cushing as I did, would it not have been mean and craven for me to turn against him, or to skulk in silence? This is not my way with

[1] The *Springfield Weekly Republican*, Jan. 16, 1874, stated that, according to the Washington correspondent of the *New York Herald*, the letter was found by a clerk, who took it to Gen. Townsend; that it then passed to President Grant through Gen. Belknap; that Grant saw nothing objectionable in it; that then Senator Sargent of California got hold of it; and that, after Senators Boutwell and Conkling had voted for Cushing in Executive Session, Sargent rose and read the note; whereupon, Senators Cameron and Carpenter said that they could not vote for Cushing, and action was postponed so that the President might be communicated with.

[2] *Sumner*, IV, 588, letter to F. W. Bird, Jan. 15, 1874. See *Reports, Reporters and Reporting, Southern Law Rev.* (April, 1879), for a remarkable description of the causes of the rejection of Williams and of Cushing by the Senate. In *Timothy Otis Howe*, by Duane Mowry, *Green Bag* (1903), XV, it is said that Howe, then Senator from Wisconsin, was offered the position of Chief Justice by Grant, but that he declined, not wishing to make a vacancy in the Senate for the election of a Democrat.

friends. Such is not my idea of friendship. But no earthly friendship could make me put in jeopardy our cause. I confess that I am glad of the sensibility shown for the safeguards of Reconstruction. . . . But what shall we do with other possible nominees? Who will vouch for B. R. C.(urtis)? And who will vouch for some accepted Republicans with whom technicality is a peril to principle?

There was now much anxiety on the part of the Bar as to the President's next action. "The country warned by two such experiences will await with unusual alarm Grant's third choice; but there is no further room for surprise," said the *Tribune*. "After the previous shocks, the people are prepared to accept, with something like equanimity, any appointment which should not be scandalous." Those who were close to Grant believed that he would appoint either the Solicitor General, Benjamin H. Bristow of Kentucky, or Morrison R. Waite of Ohio who had been one of the counsel at the Geneva Arbitration. The President fulfilled their expectation by sending to the Senate on January 19, the name of the latter. Waite was confirmed on January 21, by a vote of sixty-three to six. He was then in his fifty-eighth year, and had no previous judicial experience; his legal practice had been chiefly in Ohio; he had been admitted to practice in the Supreme Court during the previous year, but had argued no case there. The appointment was greeted with a sense of relief, but with no enthusiasm.[1] "He is an

[1] *New York Tribune*, Jan. 17, 20, 21, 1874, quoting opinions of the press; *Nation*, Jan. 22, 1874. *Amer. Law Rev.* (April, 1874), VIII, said: "His reputation in Ohio is that of a learned, upright and able lawyer. He presided over the constitutional convention of Ohio at the time of his appointment, and was with Mr. Evarts and Mr. Cushing of counsel for the United States at the Geneva Arbitration, where his services, though unaided by a prestige like theirs, were not less valuable than those of his distinguished associates. He comes to the Bench with no entanglements of personal ambition, and no judicial record with which perforce he must be consistent; and we welcome him, with the assurance that whatever he accomplished for the more full and perfect exposition of the law, will meet with the hearty support of the profession. Chief Justice Waite has had this rare experience, that

honest man and a fair lawyer and that is as much as we can reasonably expect from the President;" "a perfectly respectable man." "The President has with remarkable skill avoided choosing any first rate man. . . . On the whole considering what the President might have done and tried to do, we ought to be very thankful and give Mr. Waite a cordial welcome." Such were some of the newspaper comments. "The general feeling both inside and outside the Bar will be one of profound relief, shading into cordial approbation," said the *Springfield Republican*. "Contrasting what is, with what might have been, we congratulate the President upon his good choice, and the country upon its good fortune." "Waite is that luckiest of all individuals known to the law," said Judge Hoar, "an innocent third party without notice." "I do not hesitate to say that there were scores of lawyers in Ohio who would have been regarded by members of his profession as being as well if not better qualified," said McCulloch. "He was little known outside of the State. He had not been ranked among the great lawyers of the country." [1]

On March 4, 1874, Waite assumed his office, and served for fourteen years, to the great satisfaction of the Bar and of the public.[2]

twice — in being elected to preside over the constitutional convention of Ohio, and in being confirmed as Chief Justice — he has had all the votes of each party in his favor."

[1] *Springfield Weekly Republican*, Jan. 23, 1874; *Men and Manners of Half a Century* (1888), by Hugh McCulloch, 352; *Morrison R. Waite*, by Benjamin Rush Cowen, *Great American Lawyers* (1909), VII.

[2] With Waite's Chief Justiceship, the Court began its lengthened annual service, the beginning of the session in each year having been advanced from the first Monday in December to the second Monday in October, under the provisions of the Act of Jan. 24, 1873.

CHAPTER THIRTY-THREE

CHIEF JUSTICE WAITE AND THE FOURTEENTH AMENDMENT

1874–1878

The years of Waite's Chief Justiceship covered President Grant's second term and the Administrations of Hayes, Garfield, Arthur and Cleveland. The problems of the war and its aftermath had been largely settled before he came upon the Bench; but new and grave economic and social questions now presented themselves. These years saw the growth of the Western States and the immense development of the material resources of the country, and gave rise to a multitude of decisions on subjects of political and industrial importance — the new phases of the regulation of interstate commerce, of the transcontinental railroads and of the telegraph, railroad receiverships, the Granger legislation, control of public utilities and rates, the relation of the States to the liquor traffic, strikes and anarchist riots, polygamy, anti-Chinese legislation, superintendence and status of the Indian wards of the Nation, repudiation of State and municipal debts, the constitutionality of Federal laws enacted for the protection of the negro, the right to sue State officials and the scope of the Eleventh Amendment, the liability of agents of the Federal Government to respond for tortious acts and Federal protection of such agents for acts done in pursuance of their duties. It was fortunate for the country that the molding of its destiny in these

various directions fell upon the shoulders of a Court containing Judges of such strength of mind and character and of such breadth of vision as Waite, Miller, Field and Bradley. And the general public confidence in the Court was shown by the fact that, for over ten years after Waite's accession, it was substantially free from serious attack, either in Congress or in the press. When it is recalled that in every year from 1850 to 1873 (with the exception of the five years of the war) there had been Congressional legislation proposed in serious derogation of the Court's powers, the practical immunity from assault which occurred from 1873 to 1884 is a notable feature in its history.

One advantage which accrued to the Court during this period was the comparatively slight change in its membership; for during the first eight years of Waite's Chief Justiceship, from 1873 to 1881, there were but two vacancies. And as more than a majority of the Judges (Waite, Clifford, Field, Miller, Swayne, Bradley and Hunt) continued to serve throughout this period, the policy of the Court remained unusually stable and continuous. In 1875, an effort was made to induce the Chief Justice to allow his name to be considered for the coming Presidential nomination; but he finally refused, writing: [1]

[1] *Toledo Commercial*, Nov. 27, 1875; *New York Times*, Nov. 27, 1875. It appears that Judge Miller entertained similar views as to the propriety of a Judge of the Supreme Court becoming a Presidential candidate, see *Washington Chronicle*, Aug. 28, 1874, stating: "When the name of Justice Miller was urged in certain Republican journals, he very promptly authorized a publication in the *New York Times* that under no circumstances would he allow himself to be a candidate for any political office; that when he accepted his judicial position he abandoned political aspirations, and that he believed it inconsistent with the dignity or purity of the Bench, for Judges to allow themselves to become possible or probable candidates for any political office, however distinguished or honorable." The *Central Law Journal*, Sept. 3, 1874, said: "It is not improbable that the popular confidence in the integrity of the highest Court of the Nation may have been to some extent impaired, within the last few years, by the knowledge that some of its members were possible, or even probable, candidates for the Presidency. Whenever the integrity of the Bench is subject, in any considerable degree, to the misgivings of in-

The office came to me covered with honor, and when I accepted it, my chief duty was not to make it a stepping-stone to something else, but to preserve its purity, and, if possible, make my name as honorable as that of my predecessors. No man ought to accept this place unless he shall take a vow to leave it as honorable as he found it. There ought never to be any necessity for rebuilding from below. All addition should be above. In my judgment, the Constitution might wisely have prohibited the election of a Chief Justice to the Presidency. Entertaining such a view, could I properly or consistently permit my name to be used for the promotion of a political combination as now suggested? If I should do so, could I at all times and in all cases remain an unbiased Judge in the estimation of the people?

"Chief Justice Waite, who has been talked of as a candidate for the Presidency, has made a really valuable contribution to political literature, not only by declining to allow his name to be used for any such purpose, but by pointing out the gross impropriety of making the Bench of the Supreme Court a stepping-stone to something else," said the *Nation;* and this paper very strikingly pointed out the necessity for the preservation of the utmost possible public confidence in the Court. "The strain, indeed, which the increase and conglomeration of wealth are likely to put on judicial integrity and judicial reputation, is certainly greater than that to which they were exposed through the pressure of royal influence. The influence of the new temptation is far more subtle, and far less alarming to judicial virtue, and far harder to discover. The growth of riches is creating powerful bodies of persons whose interest in legislation and judicial decisions is enormous, whose assiduity never tires, and who can often accomplish

telligent hope, it is a public misfortune. The repose of society requires that the popular judgment should rest with confidence in the impartiality of the Bench; and this cannot be, if the Bench comes to be looked upon as a stepping-stone to political preferment."

their object just as well by pretending they are able to corrupt officers as by acknowledging that they have corrupted them. The Rings never admit that any man is pure. . . . The stronger and more daring they grow, the more necessary it is that Courts of Justice should be fortified against them; and a Court of Justice is never fortified as long as it is not above suspicion. The Supreme Court is above suspicion thus far, and there is no such dearth of Presidential candidates as to make it excusable to expose it to even a shadow of a doubt." [1]

The first vacancy during Waite's régime was brought about by the withdrawal of Judge David Davis, who after a service of fifteen years, had been elected Senator from Illinois, January 25, 1877, and who resigned as Judge on March 4, 1877, after the inauguration of President Hayes. His retirement from the Bench was not entirely unwelcome, for his participation in politics and public affairs, particularly his acceptance in 1872 of the nomination for the Presidency by the Labor Reform Party, had caused considerable comment and disapproval.[2] For Davis' place, there were many eager candidates — Senator Isaac P. Christiancy of Michigan, Senator Timothy O. Howe of Wisconsin (who had been prominently mentioned for Chief Justice, before Waite's appointment), John H. Caldwell of Arkansas, Circuit Judge Thomas Drummond of Illinois, Circuit Judge John F. Dillon of Iowa. The

[1] *Nation*, Dec. 2, 1875. *Harper's Weekly*, Nov. 27, 1875, also commented on the "essential impropriety of the effort to draw the Supreme Bench into every Presidential contest", and added: "Chief Justice Waite fulfils his duties with quiet dignity. When he took his seat, it was the general conviction that political ambition no longer sat upon the highest Bench, and the country would be spared the spectacle that had pained it."

[2] *Harper's Weekly*, Oct. 28, 1871, stated that it was reported that Davis was to be Democratic candidate for President; *ibid.*, April, 1872, "The Presidential Fever on the Bench." See also *Nation*, Feb. 1, 1877, stating that there should be a Constitutional Amendment making Judges ineligible to political office.

South urged William Frierson Cooper (Chancellor of Tennessee), Herschell V. Johnson of Georgia and Benjamin H. Bristow of Kentucky (ex-Secretary of the Treasury.[1] At one time, President Hayes had definitely decided on Bristow; but as there was strong opposition to him in the Senate, Hayes finally appointed on March 29, 1877, Bristow's law partner, John Marshall Harlan of Kentucky. Harlan was but forty-four years old; he had held no high judicial office, but for four years had been State Attorney-General.[2] Three years elapsed before another vacancy occurred. In 1880, Judge Strong resigned, after a comparatively brief service of ten years. In his place, President Hayes appointed on December 15, 1880, William B. Woods of Georgia, the first Judge from the South since the appointment of Judge Campbell, twenty-eight years before, in 1852. Judge Woods was fifty-six years old and had been United States Circuit Judge for the Fifth Circuit for twelve years.[3]

For the first six years after Waite became Chief Justice, the tendency of the Court was one of reaction from the extreme Nationalistic doctrines which had in general prevailed in the opinions delivered during and after the war. Beginning with the *Slaughterhouse Cases* in 1873, and continuing until about 1880, the decisions showed a marked tendency to uphold the powers of the States. This was particularly apparent in the cases involving the Fourteenth Amendment. Though the main purpose of the framers of that Amendment had been to cut

[1] *New York Tribune*, March 7, 1877; *New York World*, March 7; *Southern Law Rev.* (1877), N. S., III; *Philadelphia Press*, March 16, 1877; *Boston Post*, March 10, 1877, strongly opposed Bristow and urged Drummond.

[2] President Hayes wrote in his diary, March 12, 1878: "The most important appointments are the judicial. They are for life, and the Judiciary of the country concerns all interests, public and private. My appointments will bear examination;" and on March 26, 1878, referring to a bitter attack on him by Senator Howe, Hayes wrote: "His grievance is the failure to appoint him Judge."

[3] Woods was confirmed on Dec. 21, 1880, by a vote of 39 to 8.

down the State police power and to confer on the National Government the right to restrain the States in its exercise, the course of the decisions of the Court had been, with very little variation, to controvert the purpose of the Amendment, to belittle its effect, to magnify the police power and to give it an excessively wide range.[1]

Within a year after Waite's accession, the Court affirmed its adherence to the doctrine of the *Slaughterhouse Case*, by holding in *Minor* v. *Happerset*, 21 Wall. 162, in 1875, that the Fourteenth Amendment did not add to the privileges and immunities of a citizen of the United States, and that suffrage, not being a right belonging to a citizen of the United States, was not infringed by the action of a Missouri official in refusing to register a woman as a voter. Since rights pertaining to a citizen of the United States as such were few in number,[2] and since the Court had already, in 1869, held in *Paul* v. *Virginia*, 8 Wall. 168, that a corporation was not a "citizen", it now became evident that the Privilege and Immunity Clause of the Amendment, as construed by the Court, afforded slight protection to an individual, and no protection to a corporation, affected by oppressive State legislation. Consequently, litigants and their counsel began to take appeals to the Supreme Court, based on the Due Process Clause. Two ques-

[1] *Political Science and Constitutional Law* (1890), by John W. Burgess, I, 211 *et seq.* *A New Nation*, by Hollis R. Bailey, *Harv. Law Rev.* (1895), IX; *Twining* v. *New Jersey* (1908), 211 U. S. 78. It is somewhat difficult to assent to the theory propounded in *Constitutional Opinions of Justice Holmes*, by Felix Frankfurter, *Harv. Law Rev.* (1916), XXIX, 190, in which the writer contends that Judge Field's dissenting opinion in the *Slaughterhouse Cases* narrowing the scope of the State police power gradually became the prevailing doctrine of the Court, "until in *Allgeyer* v. *Louisiana*, 165 U. S. 578, in 1897, we reach the crest of the wave. The break came and the tide turned. The turning point is the dissent in the case of *Lochner* v. *New York*, 198 U. S. 45, 75, in 1905."

[2] See *McCready* v. *Virginia* (1877), 94 U. S. 391, in which a right to plant oysters in a State was held not a right pertaining to a United States citizen; so of a right to bear arms, in *Presser* v. *Illinois* (1886), 116 U. S. 252.

tions were usually presented by these cases — one whether the act by which the State interfered with the citizen constituted a lack of "due process", the other whether such act fell within the legal meaning of the word "deprive" in connection with life, liberty or property. The cases of State interference with life or liberty generally presented only the question of "due process" and involved methods of judicial or administrative procedure, or of regulation or restriction of an individual's vocation or avocation; while State interference with property might involve questions either of "due process" or of "deprivation", and generally arose out of the exercise of the police power or of the power of taxation or eminent domain.[1] Very few of the cases arising under the Amendment, prior to the death of Chief Justice Waite, in 1888, presented the question of the meaning of the word "deprive"; still fewer involved State legislation restrictive or corrective of business or labor conditions or of social activities. It was not until after the accession of Chief Justice Fuller that the great function of the Court, in upholding the progressive and experimental, social and economic legislation of modern times, was developed. Under Chief Justice Waite, the application of this Clause of the Amendment was chiefly involved in cases arising under State tax laws, and in connection with judicial procedure and changes in administrative and judicial statutes of the States. Of the latter class of cases, one of historic interest arose in the *Chicago Anarchists Case*, *Ex parte Spies*, 123 U. S. 131, in 1887.[2] The former

[1] See *Popular Law Making* (1910), by Frederic J. Stimson, 129.

[2] See *Anarchists Case*, by William H. Dunbar, *Harv. Law Rev.* (1888), I; Note on writ of error in *Fielden's Case*, *Amer. Law Rev.* (1890), XXIV, 301; see also *Fielden* v. *Illinois*, 143 U. S. 452, in 1891; see interesting article on *The Due Process Clause and the Substance of Individual Rights*, by Robert P. Reeder, *Amer. Law Reg.* (1910) N. S., XLIX, contending that the clause should not be applied to substantive rights, but only to questions of procedure.

class of cases, presenting the question of due process in tax legislation, arose very early. The first four (between 1876 and 1878) involved Reconstruction legislation in Louisiana on taxation, jury trial and betterment assessment, and the Court sustained the law in each instance. During the next ten years, tax and betterment laws of Connecticut, Pennsylvania, California, New Jersey and Kentucky and New York were sustained.[1]

As an illustration of the inadequate appreciation of the scope of the possibilities of the Fourteenth Amendment, it is interesting to note that, though, between 1868 and 1873, numerous State statutes attempting to tax property outside the State had been held to be unconstitutional, in no one of these cases was the Court's decision based on the ground that such a statute was violative of the Fourteenth Amendment.[2] In each, the Court founded its doctrine on the general underlying principles of government; "where there is jurisdiction neither as to person nor property, the imposition of a tax would be ultra vires and void," said Judge Swayne in *St. Louis* v. *Ferry Company*, 11 Wall. 423. Similarly in the famous case of *Loan Association* v. *Topeka*, 20 Wall. 655, as late as 1875, in which the constitutional validity of a State statute authorizing taxation to pay city bonds issued in aid of a bridge factory corporation was involved, neither the counsel nor the Court invoked the Fourteenth Amendment, though it was clearly applicable. Judge Miller, in holding the statute invalid, made the

[1] *Kennard* v. *Louisiana* (1876), 92 U. S. 480; *Walker* v. *Sauvinet* (1876), 92 U. S. 90; *Pearson* v. *Yewdall* (1877), 95 U. S. 294; *Davidson* v. *New Orleans* (1878), 96 U. S. 97; *Kirtland* v. *Hotchkiss* (1879), 100 U. S. 491; *Kelly* v. *Pittsburgh* (1881), 104 U. S. 78; *Hagar* v. *Reclamation District* (1884), 111 U. S. 701; *Provident Institution etc.* v. *Jersey City* (1885), 113 U. S. 506; *Wurts* v. *Hoagland* (1885), 114 U. S. 606; *Spencer* v. *Merchant* (1888), 125 U. S. 337.

[2] See *Railroad Company* v. *Jackson* (1869), 7 Wall. 262; *Cleveland etc. R. R.* v. *Pennsylvania* (1873), 15 Wall. 300; see also *Pennoyer* v. *Neff* (1878), 95 U. S. 714.

classic observation that "to lay, with one hand, the power of the government on the property of the citizen and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms." But he decided the case, not on the ground that there was lack of "due process", but that there was a limitation on the power of taxation "which grew out of the essential nature of all free governments", — "implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name." [1] A resort to the general principles of free governments for the foundation of a Federal legal doctrine was a hazy and unsatisfying method of dealing with the case.[2]

That the Court intended to proceed very cautiously in its interpretation of the phrase "due process" was shown by its opinion in *Davidson* v. *New Orleans*, 96 U. S. 97, in 1878, in which Judge Miller stated that: "Apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Constitution, by the gradual

[1] Frederic N. Judson in *The Judiciary and the People* (1913), said: "This opinion in the *Loan Association Case*, though rendered after the Fourteenth Amendment, was not based upon the guarantees of individual rights therein contained. We shall see in the discussion of this Amendment that its construction has really rendered academic this invocation of natural law; as both of the instances cited by Judge Miller of violation of domestic and property rights would be annulled under the due process of law."

[2] Three years later, in *Davidson* v. *New Orleans*, 95 U. S. 97, Judge Miller, in a case of writ of error to a State Court said, in declining to hold a State law violative of the Fourteenth Amendment: "It may possibly violate some of those principles of general constitutional law of which we could take jurisdiction, if we were sitting in review of a Circuit Court of the United States, as we were in *Loan Association* v. *Topeka*."

process of judicial inclusion and exclusion, as the cases prosecuted for decision shall require, with the reasoning on which such decision may be founded." He admitted that "if it were possible to define what it is for a State to deprive a person of life, liberty and property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other Court to any part of the fundamental law." But he warned suitors and counsel that the phrase clearly did not include a case where a party had, by the laws of the State, "a fair trial in a Court of Justice, according to the mode of proceeding applicable to such a case." Gradually, later, the Court's attitude towards the phrase "due process" crystallized into sustaining any proceeding authorized by a State Legislature which was not arbitrary and which in general preserved principles of justice and fairness; and it might finally be summed up in the phrase "giving a square deal." [1] How little inclined the Court was to restrict changes in legal procedure was shown in *Hurtado* v. *California*, 110 U. S. 516, in 1884, in which the Court was confronted with a new and vitally important question — whether the Due Process Clause prevented a State from dispensing with indictment by a grand jury in cases of felony. In a memorable opinion by Judge Matthews, one of the landmarks of our law, it was held that the State powers were not so restricted, and that the phrase "due process" in the Fourteenth Amendment was intended only to secure "those fundamental principles of liberty and justice

[1] See *infra*, 466–467, "Amid the labyrinth of decisions . . . the principle that has guided the Court is that the object of the Amendment was to prevent arbitrary action. Action is not arbitrary if the discrimination is founded upon a reasonable basis and has relation to the subject matter of the legislation." *Judicial Construction of the Fourteenth Amendment*, by Judge Francis J. Swayze, *Harv. Law Rev.* (1912), XXVI.

which lie at the base of all our civil and political institutions"; but that it was not intended to confine State legislation simply to those forms and proceedings which had been sanctioned by usage. "To hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians. . . . This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law. . . . Any legal proceeding enforced by public authority, whether sanctioned by age and custom or newly devised in the discretion of the Legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

On the question as to what action of a State was to be held to "deprive" a person of his property, the Court limited very decidedly the scope of the protection which the Fourteenth Amendment had been expected to provide, by holding in a series of cases that an act which came within the scope of the State police power could not be termed a deprivation of property. In the first case presenting this issue, *Bartemeyer* v. *Iowa*, 18 Wall. 129, which had been argued with the *Slaughterhouse Cases*, but which was not decided until a year later, the Court upheld, in 1874, a State liquor law prohibiting sale of liquor owned at its passage, as a proper exercise of the police power. Thirteen years later, in 1887, an even more radical prohibition law was upheld in *Mugler* v. *Kansas*, 123 U. S. 123, argued by George G. Vest against Joseph H. Choate; and the Court practically asserted that statutes passed in the exercise of the State police power would be upheld in every case unless the

statute "purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law." [1]

The anti-Chinese ordinances of San Francisco served as a means of further developing the limits of the State police power. In 1885, a municipal ordinance of San Francisco prohibiting laundry work at night, but in reality directed solely against the Chinese, was held by Judge Field to be constitutional, in *Barbier* v. *Connolly*, 113 U. S. 27. It was held that the Fourteenth Amendment was not designed "to interfere with the power of the State, sometimes termed its 'police power', to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity." And in *Soon Hing* v. *Crowley*, 113 U. S. 703, Judge Field, in sustaining a similar ordinance, held that the liberty guaranteed by the Constitution was "liberty regulated by just and impartial laws", and he also held that the motives which inspired the ordinance could not be inquired into by the Courts so long as its enforcement was undertaken without unjust discrimination. A Pennsylvania statute suppressing the manufacture of oleomargarine was held not to constitute a deprivation of either liberty or property, in *Powell* v. *Pennsylvania*, 127 U. S. 678, in 1888. In two cases, the Court sustained State regulation of the operation of railroads as being within the police power, and not a deprivation of property, though imposing considerable expense on the roads, *Railroad Co.* v. *Richmond*, 96 U. S. 521, in 1878, and

[1] See also *Foster* v. *Kansas* (1884), 112 U. S. 201; *Schmidt* v. *Cobb* (1886), 119 U. S. 286; *Kidd* v. *Pearson* (1888), 128 U. S. 1.

Missouri Pacific Ry. Co. v. *Humes*, 115 U. S. 512, in 1885.

But it was in the class of cases involving the power of the State to regulate the rates and charges of railroad and other corporations, that the Court most profoundly affected the course of American history. By the *Granger Cases* decided in 1877, the proponents of the Amendment, who had intended to provide a sweeping protection of civil rights against State aggression, saw its operation reduced by judicial construction to a very narrow field. For a correct understanding of the revolutionary and historic decision in these *Granger Cases*, the whole economic history of the country in the eight years following the Civil War must be carefully studied. Briefly stated, the cases originated as follows. During the years 1870–1871, there had swept through the Central West a movement known as the Grange, directed largely against the railroads and other large semi-public corporations such as the grain elevators. Somewhat coincident with the Greenback movement, it was the result of the high rates and undue discriminations by railroads and of the corporate financial excesses, abuses and legislative corruptions of the period.[1] "The State must either absorb the railroads or the railroads will absorb the State" was the Granger cry; and from it there originated radical legislation in Illinois, Wisconsin, Minnesota, Iowa and other of the States of the Central West, fixing maximum rates for the railroads, and (in Illinois) for grain elevators, and imposing heavy fines and triple to quintuple damages, attorneys' fees and costs on any corporation failing to comply with the rates fixed by the State. As described by a leading Western paper

[1] See *The Rise of the Granger Movement*, *The Outcome of the Granger Movement*, by Charles W. Pierson, *Popular Science Mo.* (1887), XXXII; *Class Struggles in America* (1907), by A. M. Simons; *The Granger Movement* (1913), by Solon Justus Buck.

in 1877: "This legislation had its origin in the unquestionable extortions of the railways. For several years following the war, the majority of the roads were run on the principle that there must be dividends amounting at least annually to ten per cent." This resulted in the least possible service and in excessive rates, especially where there was no competition. "The accommodation of the public was left out of sight altogether; and the monopoly, standing on the high ground of irrepealable charters and vested privileges, was defiant and unyielding. The outraged popular feeling at last took form in the way of public meetings, conventions and organizations, which in due time resulted in legislative enactments."[1] The significance and importance of this Granger movement was that it aroused the attention of the American people to the fact that there was a railroad problem which free competition could not solve. Moreover, it constituted the first considerable attempt to use representative government as a means of limiting the power of property owners to manage their business in their own way.[2] "The railroad corporations were in fact rapidly assuming a position which could not be tolerated," wrote a prominent authority on railroad problems. "Sheltering themselves behind the Dartmouth College decision, they practically undertook to set even public opinion at defiance. . . . In other words, they thoroughly got it into their heads that they as common carriers were in no way bound to afford equal facilities to all, and indeed that it was in the last degree absurd and unreasonable to expect them to do so.

[1] *Chicago Tribune*, March 3, 1877. "In the matter of railroad abuses, no region has felt the shoe pinch more than has the portion of the West traversed by the great trunk lines system. A few cents' fluctuation in grain rates made all the difference to the farmers between a good and a losing year." *State Legislation Regulating Railroad Traffic*, by Charles C. Savage, *Amer. Law Reg.* (1884), N. S., XXIII.

[2] *Railroads, Their Origin and Problems* (1885), by Charles Francis Adams; *Undercurrents in American Politics* (1915), by Arthur T. Hadley, 68, note.

The Granger method was probably as good a method of approaching men in this frame of mind as could have been devised." [1]

The railroads and investors very reasonably regarded the legislation with the greatest alarm. "That it has effectually destroyed all future railroad enterprises, no one who is acquainted with its effect in money centers will for a moment doubt," wrote the president of one of the roads in April, 1874. To test the validity of these various Granger laws, suits had been promptly instituted by the railroads and other corporations affected, as early as 1871; but for various reasons they were not reached for argument in the Supreme Court until the fall of 1875. Meanwhile, the panic of 1873, combined with unscrupulous manipulation and unskillful management, had left the railroads of the country in a disastrous financial condition. As a Western newspaper said in 1877, describing the changed conditions: "The panic had altered the complexion of the railroad monopoly. It revolutionized the transportation business. It had reduced railway securities and railway credits. It had put one half the railway mileage of the country into practical bankruptcy. . . . Railroads have become an article of merchandise, sold regularly at auction, not by capital stock but according to value, including a preferred portion of debt. The expenses of running railroads have been reduced; dividends are fewer and smaller. Retrenchment has become essential to life. . . . The rates have so fallen that the popular complaint which led to State legislation no longer exists." [2] Since, therefore, the reasons for the Granger laws were

[1] *The Railroad Question* (1899), by William Larrabee (Ex-Governor of Iowa).

[2] *Chicago Tribune*, March 3, 13, 1877. Defaults in railroad bonds prior to 1873 were $134,684,600 by thirty-seven railroad companies; up to 1876 defaults amounted to $814,416,000 by two hundred and one companies. The total bonded railroad debt in 1876 was $2,175,000,000; so that the percentage of default was 30.7%.

disappearing, through reform of their own methods by the railroads, and since the existence of these laws had retarded railroad extension and development by reason of the distrust of investors in railroad securities, and since some of the States had already modified their legislation, there was little belief in the general community that the laws would be upheld by the Court. The conservative and business element, especially in the East, had violently denounced the laws for many years, and had expressed confidence in their overturn by the Court. In 1874, the *Nation*, stating that the matter was soon to come on for argument, said that it was "of the last importance that it should be there determined not only correctly but in such a way as to inspire public confidence in the decision. The Court, for the first time almost in its history, is out of politics. The Judges are not Democrats or Republicans; nor are they divided, as the country once was, on the question of internal improvements. Since the lamentable fiasco of the Legal Tender decision, the Court has shown a marked tendency to conservatism and self-respect. In construing the new Amendments to the Constitution, it has shown a very laudable determination to cling to old and well-settled maxims of interpretation. The country will look with deep interest to its decision in this case." [1] An able writer in the *American Law Review* in 1875, after a thorough review of the constitutional questions, pronounced the State laws to be clearly invalid,[2] and he concluded: "The late war left the average Amer-

[1] Editorials in the *Nation:* Sept. 24, 1874, *The Right to Confiscate;* Oct. 29, 1874, *How Will the United States Supreme Court Decide the Granger Cases?* Jan. 28, 1875, *The Farmers and the Supreme Court,* stating that the existence of the Potter Law in Wisconsin affects financing of the railroads and pointing out the inconsistency of the position of the farmers, since "formerly, in order to invalidate bonds issued by counties, they asked that railroads be held purely private enterprises, and now they want them held to be public highways, entitled to only such tolls as the public deems reasonable." See also editorial, Jan. 27, 1876, *The Granger Collapse.*

[2] *The Potter Act at Washington, Amer. Law Rev.* (Jan., 1875), IX.

ican politician with a powerful desire to acquire property from other people, without paying for it. A succession of schemes, too familiar to recapitulate here, have been tried, and, after hard struggles, have been defeated by the honest common sense of the community. We have sufficient faith in the speedy clarification of ideas, among the honest advocates of the so-called Granger laws, to feel confident that this assault upon private property will soon lose their support, and be publicly classed with the exploded fallacies of repudiation and unlimited greenbacks, before the illegality of the Potter law is adjudicated at Washington. When that decision is reached, we believe it will then be received with general favor throughout the whole country. It is necessary, in order to restore public confidence in the rights of private property now severely shaken." Later, it stated that it had never believed "that a movement would succeed in America which was really directed, not against abuses, but against the rights of property. . . . When the Grangers had once proclaimed that their object was to 'fix rates' . . . it was perfectly clear that the Granger movement was rank communism."

Some of the so-called *Granger Cases*, which related to railroad rates, were argued in October and November, 1875; other of the railroad cases, together with the grain elevator case, were argued in January, 1876. Very able counsel appeared in opposition to the constitutionality of the State legislation — amongst them, Orville H. Browning, Frederick T. Frelinghuysen, William M. Evarts, Charles B. Lawrence, B. C. Cook, E. W. Stoughton and John W. Cary. In the principal case, *Munn* v. *Illinois*, 94 U. S. 113, there was involved an Illinois statute, enacted in 1871, in compliance with a provision of the Illinois Constitution (adopted in 1870) requiring the Legislature to pass laws "for the protec-

tion of producers, shippers and receivers of grain and produce." This statute, fixing the maximum charges on storage of grain in all grain elevators and public warehouses, was now vigorously attacked as a deprivation of life, liberty and property without due process of law, in violation of the Fourteenth Amendment.

On March 1, 1877, the Court rendered its decision, through Chief Justice Waite. It pointed out that the question presented by this case was the meaning of the word "deprive" as used in the Amendment, and that to determine its signification, "it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection." After a long historical discussion, the Court finally reached the conclusion that the law was as follows: that when property had become clothed with a public interest, the owner must submit to be controlled by the public for the common good; and the general test as to the character and status of property was stated to be that: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created." Applying this test to the grain elevator business, the Court pointed out that such business, established twenty years prior, had assumed immense proportions, was practically a monopoly, and affected the whole commerce in grain of seven or eight States of the West. "It is a business in which the whole public has a direct and positive interest. . . . It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute

simply extends the law so as to meet this new development of commercial progress." That the power might be abused, the Court said, was no argument against its existence. "For protection against abuses by Legislatures, the people must resort to the polls, not to the Courts." Judge Field alone dissented, stating that it appeared to him "that the Court holds that property loses something of its private character when employed in such a way as to be generally useful. . . . The doctrine . . . that whenever one's property is used in such a manner as to affect the community at large, it becomes by that fact clothed with a public interest . . . appears to me to destroy, for all useful purposes, the efficacy of the constitutional guaranty." He pointed out that the public had an interest in many private enterprises and business, in the sense in which the Court had used the term, and that to uphold the right of the public to regulate the prices and rates of such business would destroy all rights of private property.

On the same day that the Court sustained the grain elevator rate law, it upheld the validity of the laws of Illinois, Wisconsin, Iowa and Minnesota fixing maximum rates for passengers and freights on all railroads operating in those States.[1] While in these cases the laws had been claimed not only to violate the Fourteenth Amendment, but also the Commerce Clause and the Impairment of Obligation of Contract Clause of the Constitution,[2] the Court held that the State police power was supreme in respect to regulation of these public corporations; that the State legislation passed by virtue of that power did not infringe any provision

[1] *Chicago, Burlington & Quincy R. R.* v. *Iowa*, 94 U. S. 155: *Peik* v. *Chicago & Northwestern R. R.*, 94 U. S. 164; *Chicago, Milwaukee & St. Paul* v. *Ackly*, 94 U. S. 179; *Winona & St. Peter R. R.* v. *Blake*, 94 U. S. 180.

[2] See *Charter Contracts and the Regulation of Rates*, by Charles G. Fenwick, *Mich. Law Rev.* (1911), IX.

of the Federal Constitution; and that the corporations being "engaged in a public employment affecting the public interest" had been and were subject to legislative control as to rates, from the moment of their incorporation. Judge Field, again dissenting, said that the questions presented were "of the gravest importance, and their solution must materially affect the value of property invested in railroads to the amount of many hundreds of millions, and will have a great influence in encouraging or repelling future investments in such property." He regretted that though the Court had an opportunity to define the limits of the power of a State, "so that on the one hand the property interests of the stockholder would be protected from practical confiscation, and on the other hand, the people would be protected from arbitrary and extortionate charges", the Court had not done this, but had simply applied the doctrine of the *Grain Elevator Case*. The decision, he said, "in its wide sweep practically destroys all the guaranties of the Constitution and of the common law."

Though the decision of the *Granger Cases* did not result in the destruction of private business, as Judge Field prophesied, it was, nevertheless, revolutionary in the history of law; it permanently turned the economic and social development of the United States; and it established forever the power of the States over the corporations and over monopolizing wealth. That these results were fully appreciated at the time is clearly shown in the contemporary newspaper criticism. "These decisions seem to make the broadest possible affirmation of the right of the State to regulate its own commerce, and their importance can hardly be overestimated," said the *New York Tribune*, and in another editorial on "Property and the Supreme Court", it stated that the decision showed that: "The limits within

which public opinion is tending to confine the power of expropriation for reasons of public utility are extremely vague and liberal. . . . The statement of these doctrines will, no doubt, startle many people, especially in the Eastern Section of the country, though it is really a logical result of the general principle of expropriation. . . . It is an advanced guard of a sort of enlightened socialism." The *Nation* feared that the decision would give a strong stimulus to threatening, "striking" legislation; it pointed out that investors must pay close attention to the consequences of the decision; it deplored the assumption that "a common carrier is *ex vi termini* a common rogue"; but it finally concluded that though "two years ago, the judgment would have created a good deal of excitement and probably have had a serious effect on the market value of railroad property in the States from which the appeals were taken, since then, the hostility to the railroads, in States in which the legislation fixing rates originated, has disappeared; and the Granger Movement itself, as a political force has collapsed, so that the decision is not now likely to have any marked immediate influence." [1] Other conservative papers of the East hotly attacked the decision as supporting "oppression", "thievery", and "brigandage" by State Legislatures, and as semi-socialistic in its tendencies; and their view was summed up, six years later, by a noted jurist, in the statement that the decision in the *Munn Case* "stands a menace to business and material interests of all kinds. No other decision has ever been made in the course of our judicial history — not even excepting the notorious *Dred Scott Case* — which threatens such disastrous consequences to the future welfare and prosperity of the country.

[1] *Nation*, March 8, 1877; see *ibid.*, also March 29, 1877, editorial on "Management of Corporations", describing the panic in England over American railway securities.

. . . The *Elevator Case* directly strikes at the stability of private property, at rights which lie at the very foundation of modern society and civilization. . . . By the demagogues who are conducting the agitation now going on throughout the country, it is confidently appealed to and relied upon to sustain the yet more communistic and destructive legislation which they demand." [1]

It should also be noted that a part of the contemporary criticism of the decision was due to the political antagonisms which had arisen from the actions of the Hayes-Tilden Electoral Commission, on which Judges Bradley, Miller and Strong and Judges Field and Clifford had been sitting, in the month prior to the date of the decision. The decision in the *Granger Cases* was announced by the Court, on March 1, 1877, the day before the election of President Hayes by Congress as a result of the action of that Commission. The partisan excitement caused by this election and by the inauguration of Hayes led some newspapers to assert that public confidence in the Judges had been weakened, and that the country would be the less willing to accept the doctrines laid down by the Court.

The American Bar in general was undoubtedly startled at the sweeping character of the doctrines asserted in the decision.[2] The *American Law Review* termed them "the most important that have ever been made, in defining the power of the States, though the

[1] *The Supreme Court and State Repudiation,* by John Norton Pomeroy, *Amer. Law Rev.* (Sept., 1883), XVII.

[2] In 1886, William P. Wells, in an address on *The Dartmouth College Case* before the American Bar Association, said: "These decisions assert principles which have not received, and as we believe, cannot receive the assent of the most weighty professional opinion." *Amer. Bar Ass. Report* (1886); *Amer. Law Rev.* (1877–78), XI, 602, XII, 359.

For an excellent description of the conditions leading up to these *Granger Cases* and of the decisions themselves, see *The Granger Cases and the Police Power,* by James K. Edsall, *Amer. Bar Ass. Report* (1887).

discussion leaves something to be desired, and the judgment of the Bar seems to be a good deal divided." It admitted, however, that upon the whole, the decision was justified. "It is very true that the 'police power' is open to the suspicion of being a convenient phrase to cover acts, which cannot be justified by the letter of the Constitution, but which are nevertheless deemed necessary. On the other hand . . . if railroads and elevators have a constitutional right to charge what they please, it is just as truly a right to destroy the property of others as a right to make noxious vapors would be. In such cases, it is immaterial that there is no statutory monopoly, so long as there is actual power on one side and actual dependence on the other."

While opposed by the ultra-conservative part of the community, the decisions were highly approved by many prominent Eastern newspapers. The *Springfield Republican* derided the fears of papers like the *Nation*, and highly praised the decision. "This language is a complete answer to those who have claimed that the Grange policy was a policy of spoliation and robbery. It was a harsh policy, a foolish policy in the extreme to which it was carried for a brief season; but it was undertaken on a just principle, the principle that the great agricultural industry of the Western States had a paramount interest in the manner in which railroads and grain elevators were managed." Answering the "old wail, the Wall Street nonsense, that the decision renders railway capital insecure", it pointed out that: "It was the waste, extravagance and inflation of the railroad-building era which have ruined railroad enterprises and rendered capital invested insecure. . . . The idea of the railroads was that, no matter how many rings fattened off from construction accounts, the communities using the roads would be bound to pay the interest on their

inflated cost, forever. The people revolted and we don't blame them. Nevertheless, the bankruptcy which has overtaken the railroads of the country since 1873 has been due far less to the Granger legislation than to the collapse of the credit of new railroads from natural causes." Of the practical effect of the decision, it said: "Viewed in the broad and future aspect, the greatly increased strictness of railroad supervision which is the fruit of the Grange era will render railway capital more secure, instead of less so. It secures a degree of publicity of railroad affairs which was never before attempted." Of the immense importance of the legal doctrines enounced, it said: "What seemed 'thieving' and 'brigandage' proves to have been the vindication of the power of the State over all the public interests in its borders, not merely by the decision of the Supreme Court, but by the revolution in the attitude of Legislatures to corporate power — from a servile deference to a sharply critical and almost inquisitorial sovereignty." [1] The *New York Herald* said that "the decision is equivalent to a revolution in the railroad business and . . . has brought safety to the country and salvation to the railroads." It hailed with gratification the settlement of the "right of absolute control by the representatives of the people." "The time had come when either the people would govern the railroads, or the railroads would govern the people. The Supreme Court has come to the rescue, and now both the public and the railroads are safe." It pointed out that the decision had really increased the value of railroad investments, for the railroad financiers must now "cease their incessant warfare for through traffic and turn their attention to their true source of strength and profit, their local business." And it added, with some-

[1] *Springfield Republican*, March 13, 14, 1877; *New York Herald*, March 11, 1877.

what undue optimism: "There is no chance that the people will oppress the railroads. . . . The public is always just, in the long run. Any unfair treatment of railroads by legislation will be fought by the press, and eventually remedied by the people." And the general sentiment of the community was well summed up, later, by the *Independent:* "It is safer and better for the public interest that the final power to determine the toll rates of railroads should be lodged in the Legislature of a State than in a private corporation that is practically a monopoly. . . . The knowledge on their part that the Legislature can interpose its power to correct abuses is well calculated to restrain their cupidity and cause them to deal fairly and properly with the general public." [1]

The newspapers of the West, and especially in the States where the problem of railroad rate regulation had been the most vital question, naturally greeted the decisions with warm approval. The *Chicago Tribune,* while admitting that, because of financial changes, the controversy at one time so angry had lost much of its consequence, stated that, nevertheless: "The decisions of the Court are no less important, as determining the principle of constitutional power. Railroads and the people will now both recognize the principle as settled, and with such unanimity by the Courts as to preclude all probability of a change, during the next half century." [2] And it further pointed out that "no man need

[1] *Independent,* May 17, 1883.

[2] *Chicago Tribune,* March 3, 13, 1877. The *Milwaukee Sentinel,* March 6, 1877, said: "Had it not been for the rush of great events during the past week, no little stir would have been created by the announcement of the decisions. . . . We believe that the *Sentinel* might be excused for glorifying itself at this result. When the subject was being agitated, the infallible press, which term includes such papers as the *Nation,* and the great dailies of New York, Chicago and elsewhere, which assume to be Courts of last resort with respect to all such questions, vehemently protested that no power existed in the Legislatures of the States to pass such laws. The *Sentinel* alone contended for the existence of such a power. . . . In recompense for the bitter denunciation which it thus brought upon itself, it has had the satisfaction of seeing its view endorsed." See *Wisconsin State Journal,* March 8, 1877.

fear for his property in railroads, so long as those railroads recognize and act upon the principle that the true interest of both public and corporations is for the latter to depend for their profits on the magnitude of their business, and not upon the extortionate character of their rates." The Western papers further regarded as the most striking and most beneficial phase of the decisions, "the breaking down of the extreme doctrine of vested rights asserted in the *Dartmouth College Case* . . . that parent of many evils, public and private." [1] "The decisions in the *Granger Cases* have not been made too soon. They are the preliminary steps to the uprooting of the doctrine that temporary Legislatures may enact irrepealable or unalterable laws to bind peoples and States indefinitely. These decisions indicate that the reign of chartered monopolies has reached its end, and that we are approaching a recognition of the inalienability of the political or governmental powers of the State. The sooner this recognition is made, the better for the corporations and for the Government. It will cheapen special franchises; it will take from Governments the corrupting inducement to grant perpetual privileges," said the *Chicago Tribune*. The *St. Paul Pioneer Press* said that the decisions "amount to a complete revolution of what, a few years ago, was regarded as the established law of corporations", — a revision due to "the rapidly growing power of these corporations, and the unlimited powers of oppression which they would enjoy, if the logical results of the *Dartmouth College Case* were insisted upon by the Courts." It was pointed out, however, by this newspaper that the result of the decisions might be twofold, and that, while they cured an evil, they also made possible grave injury to the legitimate business. On the one hand, "it is

[1] *Chicago Tribune*, March 10, 1877; *St. Paul Pioneer Press*, March 13, 24, 1877.

justly regarded as a great public blessing that the monstrous doctrine has been overthrown, that one Legislature granting a charter with special privileges to a railroad corporation could bind all subsequent Legislatures and build up a power as sovereign as the State itself, and forever beyond the reach of governmental control, and place the public at the mercy of the corporation"; on the other hand, it said, "the decision places the corporations at the mercy of the Legislatures, deprives the capital invested in railroads of all security, and by transferring the control of their property interests from the corporation to the State Legislature, renders it liable to be at any time confiscated by ignorant, capricious or vindictive legislation." To guard against such disastrous effect upon railroad credit, and to protect and encourage legitimate investments of capital, this paper urged that the State Constitution be amended, "so as to limit the power of the Legislature to regulate railroad fares, by the common law principle that they are entitled to reasonable compensation, to be judicially ascertained." [1] Similar views were expressed in the East by the *New York Times*, that "the objection properly held is, that if each State may decide for itself what rates are reasonable, the holders of railroad stocks and bonds can have no guarantee against the application of a measure which might practically amount to con-

[1] *St. Paul Pioneer Press*, March 13, April 5, 1877: "Railroads must be placed on some new foundation in the organic law of the State which, while leaving them subject to legislative control, will place such limitations on legislative regulation of railroads, as shall protect the capital invested in them from being put to hazard or subjected to confiscation by legislative bodies, and from the perpetual peril of legislative passion, ignorance or caprice." See also *ibid.*, editorial, March 24, 1877: "There can be no question that this decision must be disastrous to all the railroad interests of the West; for it places their whole financial foundation on the shifting sands of legislative caprice. How can it be expected that capitalists will invest their money in railroads, when this decision deprives them of any control whatever over their investments, and subjects the capital they put in, to the hazard of being swept away at any moment by the breath of demagoguery? Its calamitous effects are already beginning to manifest itself." *Ibid.*, April 5, 1877.

fiscation, . . . and great properties may be placed at the mercy of a power which is essentially capricious"; and it continued: "The tendency towards meddlesome legislation to the prejudice of the rights and property is rendered more obnoxious, by the failure to exercise a legitimate authority in their behalf." Accordingly, it argued that the States, having now absolute power over the railroads, should enact legislation directed at the evils of railroad financing, and at the policies "fraught with disaster" which had prevailed in financial circles, such as improper leases, stock watering and secrecy of accounts and operations.[1]

Moreover, as has been well pointed out, a more powerful force than that of the Courts was working to protect the railroads, the investors and the public. As soon as the capitalists found that certain States would not allow them to earn interest on railroad investments, they refused to invest more money in those States. No new roads were constructed; the equipment that wore out was not replaced. While the rates at which wheat was carried to market remained low, a great deal of wheat did not get carried to market at all, owing to lack of the physical means of transportation. The Legislatures could prevent high charges, but they could not prevent deficient service; and deficient service was a worse evil than high charges. Under these circumstances the farmers found themselves compelled to allow to the railroads a fair profit.[2] Consequently, the very men who had been most active in passing rate laws, from 1870 to 1874, were the readiest to repeal them, in 1878; and even in the States where the Granger policies had taken firmest root, the sentiment developed rapidly in favor of constructive legislation, which should both

[1] *New York Times*, March 29, 1877.
[2] *Undercurrents in American Politics* (1915), by Arthur T. Hadley, 70–71.

protect the public from railroad extortion and abuses, and the railroads from unjust or confiscatory laws. "The laws were finally repealed, not because the people had tired of them or regarded them unwise or unjust," wrote a Granger advocate, "but because it was hoped that the Commission system would prove more efficient. It was offered as a compromise measure, and was accepted as such by the railroad managers, who, in their eagerness to rid themselves of the restrictions imposed by the Granger laws, gave every assurance of complete submission to the requirements of the proposed legislation." [1] This compromise, embodying the new view of the public in dealing with the railroad problem, took the shape of statutes constituting State Railroad Commissions with power to fix rates after due investigation, and to frame and administer other regulatory provisions.[2] When the validity of such statutes finally came before the Court, the composition of that tribunal had been greatly changed by death and resignation; and the trend of its decisions was far more Nationalistic than it had been in the early years of Waite's Chief Justiceship. Hence, in 1886, when the case of *Stone* v. *Farmers Loan & Trust Co.*, 116 U. S. 307, was decided, the validity of a Mississippi statute providing for a railroad commission with full regulatory powers was sustained; but the Court further held that, even though the railroad charter granted a specific power to the corporation to fix its tolls and charges, this provision was subject to the implied condition that such charges must be reasonable; and for the first time it intimated that the question of what was a reasonable rate might be for the Courts to

[1] *The Railroad Question* (1899), by William Larrabee.

[2] *State Legislation Regulating Railroad Traffic*, by Charles C. Savage, *Amer. Law Reg.* (1884), N. S., XXIII; *Constitutionality of Railroad Commissions*, by Charles C. Savage, *Amer. Law Rev.* (1885), XIX; see also *Filley* v. *Railroad* (1881), 5 Fed. 641.

decide, and not (as Waite himself had stated nine years previously) solely for the Legislature. "From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law." By this significant sentence, the corporate interests of the country and the Bar were given warning that the powers which the *Granger Cases* had recognized as possessed by the State Legislatures were by no means as unlimited as had been generally supposed. Two years later, in 1888, in *Dow* v. *Beidelman*, 125 U. S. 680, the Court remarked that the facts of the case did not present "such confiscation as amounts to a taking of property without due process of law." Finally, in 1890, thirteen years after the *Granger Cases*, the Court held in *Chicago, Milwaukee & St. Paul R. R.* v. *Minnesota*, 134 U. S. 418, that not only was the reasonableness of rates a question for ultimate judicial decision, but also that any determination of rates by legislative sanction which deprived a railroad of the right to judicial investigation of their reasonableness was invalid. As has been said, the Court "repudiated the doctrine of uncontrolled rights on the part of the Legislature to make rates, as emphatically as it repudiated the doctrine of uncontrolled rights on the part of agents of the corporation in the *Granger Cases*." [1] Judges Bradley, Gray and Lamar dissented,

[1] *Railway Passenger Rates* (1891), by Arthur T. Hadley; *Railway Transportation, its History and its Law* (1885), by Arthur T. Hadley.

on the ground that the decision overruled the *Granger Cases* (which it undoubtedly did); they held that the only limitations on the power of the Legislature to determine the reasonableness of rates was that its action must constitute "due process", that is, that it must not be arbitrary or fraudulent; and they further held that the Fourteenth Amendment did not forbid the taking of property for public uses without just compensation, but only the taking without due process. While it was generally felt that the opinion of the dissenting Judges was the more correct as a matter of strict law, nevertheless, this decision of the Court in 1890 was undoubtedly the more in accord with the general trend of judicial decisions and the temper of the times.[1] "Nothing has done more to sustain the value of American railroad securities," wrote a well-known jurist in 1895, "or to create greater confidence therein than the knowledge that beyond and above the sovereign power of the State, there is the supreme authority of the Nation over interstate as well as foreign commerce, while beyond and above that is the ultimate final doctrine of vested rights which neither State nor Nation, jointly or separately, can invade or impair."[2] On the other hand, the radical, anti-corporation portion of the community regarded the decision with some anx-

[1] See especially *The Railroad Question* (1899), by William Larrabee; and for a comprehension of the interest in the subject at this time, see *Railroads, Their Origin and Problems* (1878), by Charles Francis Adams; *The Railways, the Farmer and the Public* (1885), by Edward Atkinson; *The People and the Railways* (1888), by James Appleton Morgan; *The Relation of the Railroads to the People*, etc. (1881), by Marshall M. Kirkham; *The Railways and the Republic* (1886), by James F. Hudson; *Railway Secrecy and Trusts* (1890), by John M. Bonham; *The West and the Railroads*, by Sidney Dillon, *North Amer. Rev.* (1891), CLIII; *Railway Rates and Government Control* (1892), by Marshall M. Kirkham.

[2] *Federal Restraints upon State Regulation of Railroad Rates*, by William L. Dana, *Harv. Law Rev.* (1895), IX; and as to this whole railroad rate question, see especially *Contemporary American History* (1914), by Charles B. Beard, 71 *et seq.; The Legal, Legislative and Economic Battle over Railroad Rates*, by William W. Cook, *Harv. Law Rev.* (1921), XXXV.

iety. It noted that Judge Brewer, a newly-appointed Judge, had disclaimed all belief in the correctness of the Munn decision and had said that "the paternal theory of government is to me odious." [1] "We have even reason to believe that unless the people of the United States are on the alert, as railway managers always are, there is, with further changes in the personnel of the Court, danger of its deviating from the sound principles of law laid down in its decision in the *Granger Cases*," wrote Governor Larrabee of Iowa.

While that portion of the Court's decision in *Munn* v. *Illinois* which announced the State power to fix corporate rates was, for many years, the point on which public interest centered, it was soon realized by the Bar that the broad views announced, relative to the classes of business subject to the exercise of such power, were likely to have an even more extensive and revolutionary effect upon the course of legal and economic history. In 1888, James Bryce wrote that the *Granger Cases* "evidently represent a different view of the sacredness of private rights and of the powers of a Legislature, from that entertained by Chief Justice Marshall and his contemporaries. They reveal that current of opinion, which now runs strongly in America, against what are called monopolies and the powers of incorporated companies. . . . The Court feels the touch of public opinion." [2] As early as 1891, in an article entitled "A New Constitutional Amendment", it was said: "In a commercial emergency, the oracles of the law have been approached. . . . They now give forth a response, which startles lawyers and laymen. . . . For the first time, it is appreciated that there has lain dormant for a century a vigorous principle of the common law, an element of

[1] Brewer, J., in *Budd* v. *New York*, 143 U. S. 517.
[2] *The American Commonwealth* (1888), by James Bryce, I, 267.

Anglo-Saxon government, which, in the hands of an aristocracy, has often been an instrument of wrong and oppression, and which may, in the hands of the people, effect a despoliation of property owners, surpassing the encroachments of the Crown at the worst periods of English history. . . . Years ago, the Court introduced the Slavery struggle with the Dred Scott decision. To-day, it may be that it has introduced the property struggle, with the decision of *Munn* v. *Illinois*. . . . The principle is one which can only be regarded with anxiety and alarm by conservative minds. Speculation falters in guessing at the uses to which it may be put in experimental legislation by those who believe in the theory of State control. . . . A learned ex-Judge of one of the Federal Courts remarked on reading the opinions: 'If this Government is to endure, the views expressed in the dissenting opinion of Mr. Justice Field must be adopted as the law of the land.' "[1] On the other hand, it was said that though the *Munn Case* seemed to "strike a telling blow at individualism and lends a strong support to the socialistic ideas of the day", yet that "the doctrine may be regarded rather as an effort of individualism to stem the rising tide of combination, rather than as socialistic, a stand made by the individual rather than a move forward of socialism."[2]

In spite of all apprehensions and of Judge Field's foreboding, the State Legislatures refrained for many years from unduly extending their control of private business; and the Court had occasion to apply the doc-

[1] *A New Constitutional Amendment*, by Charles C. Marshall, *Amer. Law Rev.* (1891), XXIV, stating that the case had been "conspicuous for a torrent of adverse criticism." Everett V. Abbot in *Justice and the Common Law*, in 1913, said: "The *Granger Cases* are still to be justified. . . . Public interest and public right are two very different things."

[2] *The Doctrine of the United States Supreme Court of Property Affected by a Public Interest, and its Tendencies*, by W. Fred Fisher, *Yale Law Journ.* (1895), V.

trine of "business clothed with a public interest", to but few businesses, other than those involved or discussed in the *Granger Cases*.[1] Nevertheless, the right of control still remained where it was placed by the Court in 1877; and the existence of such a right in a State Legislature served as a warning, and as a check on corporate pretensions. Until the year 1914, however, it was generally regarded by law writers that under this decision, any business in which there was a virtual monopoly as a permanent condition inherent in the nature of things, might at any time be subjected by the Legislature to a regulation of its charges, the conditions which might produce such virtual monopoly being various — natural limitations such as available sources of supply, restricted opportunities of access, necessity of conduct of business within a certain location, difficulties in distribution, large scale of the business and absence of effectual substitutes.[2] In 1914, a momentous decision of the Court in a case involving the regulation of fire insurance seemed to broaden the foundation of power

[1] For later discussions of the principles involved, see *Budd* v. *New York* (1892), 143 U. S. 517: *Brass* v. *North Dakota* (1894), 153 U. S. 391; *Covington etc. Turnpike Road Co.* v. *Sandford* (1896), 164 U. S. 578; *Smyth* v. *Ames* (1898), 169 U. S. 466, *Cotting* v. *Kansas City Stockyards Co.* (1901), 183 U. S. 79. It is interesting to note that Judges Brewer and Field dissenting in the *Budd Case*, in 1892, fifteen years after the *Munn Case*, expressed the belief that the Court would abandon its doctrine. Twenty years have elapsed since the *Budd Case*, without any change of the Court's doctrine. See also *Block* v. *Hirsh*, 41 Sup. Ct. Rep., April 18, 1921.

[2] This was practically the explanation of the *Granger Case* given a year later by Judge Bradley in the *Sinking Fund Cases*, 99 U. S. 700, 747, in 1878, "that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power." See also *Social Reform and the Constitution* (1911), by Frank J. Goodman; *Increased Control of State Activities by Federal Courts*, by Charles A. Moore, *Proc. Amer. Pol. Science Ass.* (1901); *The Coal Mines and the Public*, by Heman W. Chaplin (1902); *The Coal Mines and the Law*, by Bruce Wyman, *Green Bag* (1902), XIV; *A Word More as to the Coal Mines*, by Heman W. Chaplin, *Green Bag* (1902), XIV; *Control of the Market*, by Bruce Wyman (1901); *Public Service Company Rates and the Fourteenth Amendment*, *Harv. Law Rev.* (1901), XV; *Popular Law Making* (1910), by Frederic J. Stimson.

of State regulation, and to base it purely on the "public interest" requiring such a regulation, as determined by the Legislature.[1] But, while the legislative power of regulation was, until recent years, extended to few additional cases of private business "clothed with a public interest", it was applied to a large number of varied corporate interests the control of which has been justified by the semi-public nature imparted to them by the possession of special franchises; and the extent of the authority of the State Legislatures to regulate the charges of water, gas, electric light, telephone, street railway, bridge, turnpike, irrigation, ore-carrier and numbers of other like corporations has been the subject of a mass of litigation and decisions by the Court.[2]

Having thus, as early as 1877, limited both the Privilege and Immunity Clause and the Due Process Clause of the Fourteenth Amendment, the Court under Chief Justice Waite gave also a restricted meaning to the Denial of the Equal Protection of the Laws Clause. About ten decisions were rendered involving this portion of the Amendment; but in only one case was the action of the State found to come within its proscription.[3] In *Missouri* v. *Lewis*, 101 U. S. 22, the Court stated that all that this Clause meant was "that no person or persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place under like circumstances." In 1886, a case was decided in which the country expected that the

[1] *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389; see especially *Business Jurisprudence*, by Edward A. Adler, *Harv. Law Rev.* (1914), XXVIII; *Labor, Capital and Business at Common Law*, by Edward A. Adler, *ibid.* (1916), XXIX; *Notes on the Federal Power to Regulate Commodity Prices, Cong. Rec.*, June 16, 1917.

[2] See *Spring Valley Waterworks* v. *Schottler*, 110 U. S. 347, as early as 1884; and see *Public Service Company Rates and the Fourteenth Amendment*, by Nathan Mathews, Jr., and William G. Thompson, *Harv. Law Rev.* (1901), XV.

[3] In *Yick Wo* v. *Hopkins* (1886), 118 U. S. 356; see also *Missouri* v. *Lewis* (1880), 101 U. S. 22; *Fire Ass. etc.* v. *New York* (1886), 119 U. S. 110; *Hayes* v. *Missouri* (1887), 120 U. S. 68; *Dow* v. *Biedelman* (1888), 125 U. S. 680; *Pembina Mining Co.* v. *Pennsylvania* (1888), 125 U. S. 181.

Court would finally settle a great question long agitated in the community: how far, under the Amendment, a State might impose upon corporations a different system of taxation from that imposed upon individuals. The question had been argued with supreme ability by George F. Edmunds, William M. Evarts and Roscoe Conkling in 1882 and 1886, in two cases involving California taxes on the Southern Pacific Railroads. The decision of the Federal Circuit Courts had been in favor of the corporation tax involved. "If confirmed by the Supreme Court, it will add greatly to the protective usefulness of the Fourteenth Amendment," said the *Independent*. "It will impose a restriction upon the taxing power of the States, adapted to guard against abuses of the power, and promote the general interests of justice among the people." [1] The question was not decided at this time, in 1886, since the case was disposed of on another point; but Judge Field in a concurring opinion stated his regret that the Court had not passed on the question whether, in the tax assessment involved, "an unjust discrimination had been made between the corporation's property and the property of individuals, to its disadvantage, thus subjecting it to an unequal share of the public burdens, and to that extent depriving it of the equal protection of the laws." "At the present day," he said, "nearly all great enterprises are conducted by corporations, and a vast portion of the wealth of the country is in their hands. It is, therefore, of the greatest interest to them, whether their property is subject to the same rules of assessment and taxation as the property of natural persons. . . . The question

[1] *County of San Mateo* v. *Southern Pacific R. R.* (1885), 116 U. S. 138; *Santa Clara County* v. *Southern Pacific R. R.* (1886), 118 U. S. 394; *Independent*, Nov. 30, 1882; *New York Tribune*, Dec. 19, 1882; *New York World*, Jan. 23, 1883, giving high praise to Conkling's argument, and speaking of the "novel aggression of sandhill radicalism upon corporation and capital, as embedded in the Constitution of California."

is of transcendent importance, and it will continue to come here, until it is authoritatively decided, in harmony with the great Constitutional Amendment, which insures every person, whatever his position or association, the equal protection of the law; and that necessarily implies freedom from the imposition of unequal burdens under the same conditions." In later years, the Court finally disposed of the question by confirming fully the power of the State to discriminate between corporations and individuals in methods of taxation.[1]

It is interesting to note that throughout the period of Chief Justice Waite's term of office, the Court evinced considerable apprehension at the number of cases which were being presented to it under the Fourteenth Amendment. As early as 1878, at a time when less than twenty cases had involved the Amendment, the Court gave the following warning, through Judge Miller, in *Davidson* v. *New Orleans*, 96 U. S. 97: "It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal Government, for nearly a century, and while, during all that time, the manner in which the powers of that Government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theater of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this Court is crowded with cases in which we are asked to hold that State

[1] It is interesting to note that it was not until the year 1885 in this case of *County of San Mateo* v. *Southern Pacific R. R.*, 116 U. S. 138, that the Court for the first time expressly recognized a corporation to be a "person" within the meaning of the Fourteenth Amendment; and a distinct decision to that effect was made in 1888 in *Pembina etc. Mining Co.* v. *Pennsylvania*, 125 U. S. 181.

Courts and State Legislatures have deprived their own citizens of life, liberty or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this Court the abstract opinions of every unsuccessful litigant in a State Court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." And in 1885, in *Missouri Pacific Railway Co.* v. *Humes*, 115 U. S. 512, the Court, through Judge Field, expressed "its increased surprise at the continued misconception of the purpose of the provision"; and it again asserted that the "hardship, impolicy, or injustice of State laws is not necessarily an objection to their constitutional validity", and that "this Court is not a harbor where refuge can be found from every act of ill-advised and oppressive State legislation." So long as the State's action is not purely arbitrary, and the enforcement of the law is "attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice or oppressive character of the law will not invalidate them as affecting life, liberty or process without due process of law."

These expressions of alarm, while scarcely required by the actual number of cases then presented, were later to be justified. For while less than seventy cases were decided under that Amendment in the sixteen years between 1873 and 1888 inclusive, about seven hundred and twenty-five were so decided in the thirty years from 1888 to 1918.

CHAPTER THIRTY-FOUR

THE CIVIL RIGHTS ACTS

1875–1884

WHILE the scope of the Fourteenth Amendment and the degree of its application to the financial, economic and social legislation of the period were thus being gradually developed by Chief Justice Waite and his Associates, the greatest growth of this branch of the law did not begin until after Waite's death in 1888. The meaning and effect of that Amendment, however, so far as it concerned the negro race for whose protection it had been primarily adopted, were fully and definitely settled by Waite and his Court, in a series of eight cases between 1876 and 1884.[1]

The conservative and restricted interpretation which the Court, under Chief Justice Chase, had placed on the Privilege and Immunity Clause of the Amendment had given a warning to the extreme Reconstructionists

[1] It may be noted that the Thirteenth Amendment was proclaimed to be in force, Dec. 18, 1865; the Fourteenth, July 28, 1868; the Fifteenth, March 30, 1870. The statutes passed in enforcement of the Amendments were as follows: the Civil Rights or Enforcement Act of April 9, 1866; the Civil Rights or Enforcement Act of May 31, 1870, Act of Feb. 28, 1871; the Ku Klux Act of April 20, 1871; the Civil Rights Act of March 1, 1875. See *Documentary History of Reconstruction* (1906), by Walter L. Fleming; *The Federal Enforcement Acts*, by William W. Davis, *Studies in Southern History and Politics* (1914); *Essays on the Civil War and Reconstruction* (1904), by William A. Dunning; *Reconstruction, Political and Economic* (1907), by William A. Dunning.

In April, 1872, the Civil Rights Enforcement Act of April 9, 1866 (passed prior to the Fourteenth Amendment) was considered in *Blyew* v. *United States*, 13 Wall. 581, but its constitutionality was not passed upon. This Act had been held constitutional in cases in the Federal Circuits Courts by Judge Swayne, in Kentucky in 1866, and by Chief Justice Chase, in Maryland in 1867, and Horace White said in his *Life of Lyman Trumbull* (1913), 274–275, that: "If either of these cases had been taken to the Supreme Court on appeal at that time, the Civil Rights Act of 1866 would doubtless have been upheld by that body."

that their hopes as to the validity of National Legislative protection to the negro might be dashed. When the additional Civil Rights Act of 1875, which directly penalized discrimination against the negro in public conveyances, hotels and elsewhere, was under debate in Congress, it was pointed out in the press that its validity was highly doubtful. "There can be little doubt," said the *Nation*, "that if it were not for the fatal habit we have fallen into since the war of regarding the Central Government practically above the law and the Constitution, whenever the negro is concerned, the mere suggestion of the constitutional points ought to have killed the bill forever. It is plainly unconstitutional. . . . The Fourteenth Amendment has twice come before the Supreme Court; and on neither of these well-known occasions was the decision of the Court of such a character as to lend much encouragement to those who believe the new Amendments to have introduced very revolutionary principles as to the relations of the States to the General Government. . . . In the light of these decisions, it may safely be inferred that the Supreme Court must look with extreme suspicion upon a law, upsetting the domestic law of States on the subject of schools, of common carriers, of innkeepers, and substituting for them the new and strange system invented by the authors of this bill. In the interest of the negro, we trust that it may never reach the Court. Deeply as we sympathize with his wrongs, we have no expectation or hope of seeing them righted, by hounding on his old masters to acts of violence and lawlessness, by the passage of equally violent and lawless Acts of Congress. The Reconstruction period is ended, and the negro in future will occupy such a position as his industry and sobriety entitle him to. Such bills as the one we have been considering do nothing

for him but turn his friends into enemies." [1] The probable action of the Court was thus correctly prophesied; for within a year after this Civil Rights Act of 1875 passed, two decisions were rendered which entirely demolished the Radical Reconstructionist plan of protecting the rights of the negro by direct Federal legislation. On March 27, 1876, the Court, in *United States* v. *Reese*, 92 U. S. 214, held unconstitutional sections three and four of the earlier Civil Rights Enforcement Act of May 31, 1870, which penalized inspectors in State elections for refusing to receive and count votes and for obstructing any citizen from voting. In an opinion rendered by Chief Justice Waite, the Court held that under the Fifteenth Amendment, Congress had only power to enforce "by appropriate legislation" the right to exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude; that the statute in question was not confined to such a limited class of discrimination, but extended broadly to all discriminations and obstructions; that, so construed, it was an unconstitutional interference with the rights of the States. To the old argument against the Court's power to overthrow an Act of Congress, the Chief Justice replied that, while Congress was supreme within its legislative sphere, the Courts, "when called upon in due course of legal proceedings, must annul its encroachments upon the reserved powers of the States and the people." The decision in this case had been long looked for with much anxiety by those opposed to Federal interference in State elections; and the care with which the Court considered the case was shown by

[1] *Nation*, Sept. 17, 1874; see also *The Constitutionality of the Civil Rights Law*, by William Archer Cooke, *Southern Law Rev.* (July, 1875), N.S., I, 193: "There may be a partisan feeling moving the spirit of the law; in a legal sense, we have nothing to fear from it if the same feeling does not invade the Bench."

the fact that while it was argued, January 13, 1875, by Attorney-General Williams and Solicitor-General S. F. Phillips against the veteran Henry Stanbery and B. F. Buckner, the Court reserved its decision for fifteen months. Concomitant with this case, the Court rendered another decision which came as a heavy blow to those who were seeking to protect the negro voter. In *United States* v. *Cruikshank*, 92 U. S. 542, indictments had been found for conspiracy under section six of the statute, which forbade any person "to injure, oppress, threaten or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States." Frauds and violence against the negroes in Louisiana State elections were involved in this case; and the defendants were charged with conspiring to prevent citizens in the enjoyment of their right to peaceably assemble with others, of their right to petition for redress of grievances, of their right to bear arms and of their right to vote; also with conspiring to falsely imprison and murder and thus deprive citizens of their lives and liberty without due process of law. Arguments had been heard in March, 1875, the Attorney-General and the Solicitor-General appearing for the Government, and David Dudley Field, Reverdy Johnson, Philip Phillips, John A. Campbell and R. H. Marr for the defendants. The decision, handed down, over a year later, was a notable victory for the defendants' eminent counsel. The Court held that the various rights so set up were not rights which citizens enjoyed by virtue of, or which were secured to them by, the Constitution of the United States; and hence, the actions set forth in the indictment did not come within the purview of the statute. "The right

of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution . . . and always has been one of the attributes of citizenship under a free government," the Court said. "It was not, therefore, a right granted to the people by the Constitution." This same was held true as to the right to bear arms. With respect to the right to due process, while the Fourteenth Amendment prohibits a State from denying due process, the Amendment does not add anything to the right which a citizen already possessed. "It simply furnishes an additional guaranty as against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. . . . The power of the National Government is limited to the enforcement of this guaranty." The right to vote was held to come from the States only, and it was only right of exemption from discrimination on account of race or color under the Fifteenth Amendment, which came from the United States. Inasmuch as the indictments did not allege such discrimination, they could not be upheld. "We may suspect," said the Court, "that race was the cause of the hostility, but it is not so averred."

The practical effect of these decisions was to leave the Federal statutes almost wholly ineffective to protect the negro, in view of the construction of the Amendments adopted by the Court, the lack of adequate legislation in the Southern States, and the extremely limited number of rights which the Court deemed inherent in a citizen of the United States, *as such*, under the Constitution. The decisions, nevertheless, were believed by all, except the Radical opponents of the South, to be wise and to open the door for more sane and liberal methods of dealing with the negro problem

in the South. "The fatal defect in the legislation consists in an assumption, which, if it were true, would revolutionize our whole system of government, and as remarked by the Supreme Court, clothe Congress at its discretion with jurisdiction in respect to the entire domain of civil rights heretofore belonging exclusively to the States," said the *Independent*. "To assume State powers as the method of punishing and preventing wrong in the States would be an experiment with our political system that had better be omitted. The ostensible end will not justify it. Southern questions, so far as they are purely State questions, must be left to the States themselves, and to those moral influences which finally shape the course of legislation. The General Government cannot authoritatively deal with them, without producing more evils than it will remedy." [1] It further pointed out that, as the Court did not concur with the underlying theory on which the statutes were based, namely, that the Amendments gave to Congress the power to enact ordinary police legislation penalizing trespasses and crimes committed by individuals in the States, the decision should serve as a warning to Congress to keep within the scope of its constitutional powers. Similarly, the *New York Times* said that the source of a good many blunders made in the legislation was "the tendency to confound the right which one citizen must respect in another with the rights whose enjoyment the State must guarantee to all its citizens. The United States have neither the power nor the obligation to do police duty in the States, a fact which both Judges and Legislators have committed serious mistakes in ignor-

[1] *Independent*, April 6, 13, 1876; *New York Times*, March 8, 29, 1876; *New York Tribune*, March 29, 1876; *New York Herald*, March 28, 1876. *Chicago Tribune*, March 22, 29, 1876; *New York World*, March 28, 1876; *Harper's Weekly*, March 20, 1875, at the time of the argument.

ing." That the decision marked the commencement of a new era in the exercise of legislative power, and formed, like the *Slaughterhouse Case* decision, a curb on the breadth of power theretofore asserted by Congress was ably pointed out by the *New York Tribune*. "During and since the war, Congress has often acted as if it were supreme, not merely within but outside of its constitutional limitations. For some error in this direction, there was much excuse. A powerful party persistently tried to make the Constitution of the United States the left wing of Lee's army. The same party had so construed the Constitution as to make it the bulwark of slavery." Under such conditions, public opinion rejected the theory that in time of war the Nation did not have full power to defend itself, and supported Congress in its asserted power to adopt any measure which it deemed necessary to public welfare. But, after the war, said the *Tribune*, "greedy and malignant partisanship began to demand, as necessary to the public welfare, measures which were only needful for the maintenance of unworthy or corrupt men in power. Of these measures, the Enforcement Act was one of the most odious. Under it, shameful abuses have been perpetrated; " and it concluded impressively: "It will now lie dead upon the statute book, to remind future generations of Americans that no conceivable abuse of the Constitution by one party can justify disregard of the Constitution by the other." [1]

The more partisan Republican papers, like the *Chicago Tribune*, regarded the decisions with mixed views. After saying that "for clearness of thought and trimness of expression" the opinions would "commend the new Chief Justice to the confidence of his countrymen", it stated that it was "fortunate, in so

[1] See also *Springfield Republican*, March 28, 29, 1876.

far as it restrains Congress from enacting penal legislation in elections beyond the power conferred upon it by the Constitution, the infraction of which would be seriously dangerous, no matter what party were in power. But it is unfortunate, in so far as it may, for a time, open up the opportunity for serious abuses, and perhaps terrorism in the South. . . . The present law, being practically inoperative, will exercise no restraint upon those who desire to interfere with the votes of the colored people at the South. The necessity for further and proper legislation, to carry into effect the provisions of the Fifteenth Amendment, will be another reason, however, for renewed effort on the part of the Republican Party to regain control of Congress." The Democratic papers of course applauded the decision. "It may be described as the final and authoritative enunciation of the doctrine of the duality of the American system of Government and the dual nature of American citizenship," said the *New York World.*

The Radical Reconstructionists and their press saw, with anger and dismay, their whole scheme of legislation overthrown; and, as one party organ said, under the Court's construction, the statute was "only a pretense, keeping a promise to the colored man's ear and breaking it to his hope", and "if the Amendments, intended to secure all citizens of the United States from legal discriminations on account of color, fail to express their intention, the blunder is unprecedented."

But both supporters and opponents agreed in the view that the opinions rendered in the cases proclaimed the new Chief Justice a great lawyer. "Chief Justice Waite, in this decision and in the terms of its utterance, has vindicated his disposition and capacity to emulate the fame of Jay, Marshall and Taney," said the *New York World;* and the *New York Times*

said: "So far as they may be regarded as reflecting his influence upon the Court, they afford abundant evidence that his appointment was a judicious one, adding strength and dignity to that great tribunal. . . . The decisions deal with constitutional questions of the highest order, and deal with them in a way to render still more firm the confidence of the people in the impartiality and wisdom of the Court, and to enhance the value of that department of the Government as a means of securing the rights of citizens. It is the highest function of the Supreme Court to interpret the National Constitution."

Viewed in historical perspective now, however, there can be no question that the decisions in these cases were most fortunate. They largely eliminated from National politics the negro question which had so long embittered Congressional debates; they relegated the burden and the duty of protecting the negro to the States, to whom they properly belonged; and they served to restore confidence in the National Court in the Southern States. As an eminent Southern lawyer has said: "When the decision was reached and the prisoners were released, the utmost joy succeeded [in Louisiana], and with it a return of confidence which gave best hopes for the future. . . . What gave satisfaction to the South and strength to bear the affliction in which they found themselves was the determination of the Court to maintain the true character of the Government, and to hold, notwithstanding the excited feeling growing out of the war, that the existence of the States, with powers for domestic and local government including regulation of civil rights, the rights of persons and property, was essential to the perfect working of our complex form of government." [1]

[1] *Fifty Years' Experience in Practice at the Bar*, address of Carleton Hunt, LL. B., at a meeting of the Louisiana Bar Association, June 6, 1908.

A year after these decisions, President Hayes partially adopted the policy of leaving the South to work out its problems free from National interference, by withdrawing the regular army from Louisiana and South Carolina in April, 1877. An attempt by the Democratic Congress to repeal the Civil Rights Enforcement Acts was vetoed in 1877 by the President; but the Democratic success in the election of 1878 brought about a two years' fight for such repeal, and a bill was actually passed, as a rider to an Appropriation Act, forbidding the United States marshals to use military forces in the execution of election laws. It was not until 1894, under President Cleveland, that the chief obnoxious provisions of the Enforcement Acts were finally abolished.

Meanwhile, the extent to which the Fourteenth Amendment could be invoked for the protection of the negro was being further explained by other decisions of the Court. In 1880, in *Strauder* v. *West Virginia*, 100 U. S. 303, the Court reiterated that the chief design of the Amendment "was to protect an emancipated race and to strike down all possible legal discriminations"; and it held that a State statute which confined jury duty to white persons violated the Amendment, by failing to secure to negroes the equal protection of the laws guaranteed to them by the National law and Constitution. The validity of the section of the Civil Rights Act, which authorized removal into the United States Courts when the equal rights of a citizen were denied in the State Courts, was upheld by the Court on the ground that, as the Amendment provided that Congress might enforce it by appropriate legislation, removal of cases into United States Courts had been "an acknowledged mode of protecting rights,

ever since the foundation of the government." [1] That Congress still possessed some power of protecting the negro against discrimination was shown in *Ex parte Virginia*, 100 U. S. 339, in 1880, a case which involved the actions of one Coles, a County Court Judge of Virginia held in custody on a Federal indictment charging him with excluding negroes from jury service. The Court held that he was not entitled to release on a petition for habeas corpus to the Judge of the United States District Court. "A State acts by its legislative, its executive or its judicial authorities," said the Court. "It can act in no other way. The Constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the law." Since the Amendment was enacted to secure equal rights, and since Congress was given power to enforce its provisions against the State, "such legislation must act upon persons, not upon the abstract thing denominated a State, but upon the persons who are the agents of the State in the denial of the rights which were intended to be secured." Strong dissents were filed by Judges Field and Clifford, who denied that Congress had the power "to exercise coercive authority over judicial officers of the States in the discharge of their duties under the State laws." They claimed that such power would reduce the States "to a humiliating and degrading dependence upon the Central Government; engender constant irritations, and destroy that domestic tranquillity which it was one of the objects of the Constitution to ensure. . . . Those who regard the independence of the States in all their re-

[1] See the *Nation*, March 4, 1880; see also *Virginia* v. *Rives*, 100 U. S. 313, limiting the operation of the Removals Act to action of a State official occurring prior to trial; *Bush* v. *Kentucky*, 107 U. S. 110.

served powers . . . cannot fail to view with the gravest apprehension for the future" an indictment of a State Judge in a Federal Court.[1] If this decision, said the *Nation*, "is to be carried to its logical results, (it) implies a long, and we may add, an unexpected stride in the direction of centralization."

In *Neal* v. *Delaware*, 103 U. S. 370, the Court held that the Fifteenth Amendment *ipso facto* rendered inoperative the provisions of the Constitution and laws of Delaware, in force at the time of its adoption, restricting jurors to white persons qualified to vote; and that the absence of any statute, in conflict with the Fifteenth Amendment since its adoption, constituted a presumption "that the State recognizes as its plain duty" the binding force of the Amendment. The Court found, therefore, that there was no denial of equality by the State, and hence no right of the defendant to remove his case into a United States Court. But on the facts presented, showing an actual discrimination against negroes in the drawing of the jury by State officers, it held that "the refusal of the State Court to redress the wrong by them committed was a denial of a right secured to the prisoner by the Constitution and laws of the United States," and it reversed the judgment of the State Court.

[1] The final outcome of this case was interestingly commented on by the *Nation* March 25, 1880: "One of the Virginia Judges, Judge Hill, whose indictment for not summoning negroes on juries has been sustained by the late decision of the United States Supreme Court has been, at Lynchburg, tried before Judge Rives and a jury composed of ten white and two colored men, and acquitted without argument, the evidence against him having completely broken down. We presume that what brought him into trouble was the difficulty which exists in many parts of the South of finding negroes mentally and morally qualified to sit on juries. Those who think the chief end of Courts of law is the dispensing of justice between litigants and between the State and criminals, and not the exemplification of social and political equality will feel that a certain amount of discretion in making up juries must be lodged somewhere, and that if those who are engaged in the duty and give the necessary guarantees as to character, are to be pursued criminally whenever their use of discretion does not satisfy local politicians, far more valuable things than any man's right to be summoned on a jury will suffer seriously."

In 1883, however, the Court rendered two decisions which practically put an end to attempts on the part of the Federal Government to settle the negro question by means of indictments in the Federal Courts. In *United States* v. *Harris*, 106 U. S. 629, which involved the constitutionality of section two of the Ku Klux Act of April 20, 1871, making it criminal for two or more persons to conspire or go in disguise upon the highway or upon another's premises for the purpose of depriving any persons of the equal protection of the laws and privileges and immunities under the laws, the Court held the section invalid, as unwarranted by the provisions of any of the Amendments, which, in granting to Congress the power to enforce their provisions, did not authorize Congress to legislate directly as to the acts of private persons.[1] In the *Civil Rights Cases*, 109 U. S. 3, decided October 15, 1883, the Civil Rights Act of March 1, 1875, was finally held unconstitutional. This statute had made it a crime for any person to deny full and equal enjoyment of the accommodation of inns, public conveyances and places of public amusement. The Court, through Judge Bradley, held the law to be beyond the power of Congress, and again stated that the Fourteenth Amendment did not invest Congress with power to legislate on subjects which are within the domain of State legislation, or to create a code of municipal law for the regulation of private

[1] The *Nation*, April 20, 1871, at the time of the passage of this Ku Klux Act had accurately predicted the decision of the Court as to its validity, and had said: "Its central idea develops itself into a plan by which the United States Courts may exercise full criminal and civil jurisdiction over any and all acts of violence to the person and property of private citizens; by which, in short, Congress and the National tribunals may assume and wield a complete police power throughout the States." See *contra*, *Amer. Law Rev.* (1870), V, 249. After the decision of the case, the *Nation* said, Aug. 31, 1882, that for its "disloyal" view of the subject in 1871, "we were severely criticised, at the time, by those who, like the late Mr. Sumner, thought that what the country wanted was 'the centralization of liberty' and 'the imperialism of equal rights.' Nevertheless, the view we advanced is precisely that now laid down by the Supreme Court."

rights, but only authorized Congress to enforce its provisions by "appropriate legislation for correcting the effect of such prohibited State laws and State acts and thus to render them effectually null, void and innocuous." In other words, the legislation which Congress was authorized to adopt was "not general legislation upon the rights of the citizen, but corrective legislation." Congress could not step into the domain of local jurisprudence and lay down rules for the conduct of individuals in society towards each other. The Court further held that refusal of accommodation to a negro could not be justly regarded as imposing any badge of slavery or servitude upon him; and it said that "it would be running the slavery argument into the ground, to make it apply to every act of discrimination which a person may see fit to make as to the guest he will entertain"; hence the statute could not be upheld as a proper means of enforcing the Thirteenth Amendment. An interesting and vivacious dissenting opinion was given by Judge Harlan, who regarded the statute as clearly valid under the Thirteenth Amendment, and said that he could not "resist the conclusion that the substance and spirit of the recent Amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism."

"The decision settles the point forever, that the Fourteenth Amendment merely adds new limitations upon State action to those already existing in the Constitution, and does not change in any way the fundamental structure of the Government," said the *Nation*; and the *Independent* said: "It is important for both the State and the Federal Government to keep within the sphere assigned to it. In this way, and in no other way, can our duplicate system of government be harmoniously and successfully worked;" and it stated

that though "several leading colored men have expressed great indignation and disappointment, the Court is clearly right. The question as to the class of rights involved belongs exclusively to the States. There is the proper place to look for a remedy against any abuse of these rights." [1] *Harper's Weekly* said that the decision commended itself to every intelligent mind and showed the groundlessness of the fears, recently expressed, of a "dangerous centralizing tendency in the government." It stated that the decision was in strict accord with "the true doctrine of National supremacy, with distinctly defined State authority — one of the great traditions of the Supreme Court"; and that since the "long and terrible Civil War sprang from the dogma of State sovereignty, invoked to protect and perpetuate slavery, it was natural that, at its close, the tendency to magnify the National authority should have been very strong, and especially to defend the victims of slavery. . . . In a calmer time, the laws passed under that humane impulse are reviewed, and when found to be incompatible with strict constitutional authority, they are set aside. It is another illustration of the singular wisdom of our constitutional system." "The Court has been serving a useful purpose in thus undoing the work of Congress," said the *New York Times*; and it urged this memorable word of warning to all those who were inclined to look to the National Government for aid against local abuses, which should be cured locally. "The fact is, that, so long as we have State governments, within their field of action we cannot by National authority prevent the consequences of misgovernment. The people of the State are dependent on their own civilized ideas and

[1] *Independent*, Feb. 1, Oct. 25, 1883; *New York World*, Jan. 23, 1883; *Harper's Weekly*, Feb. 3, 1883; *New York Times*, Jan. 24, 1883; *New York Herald*, Jan. 30, 1883.

habits for the benefits of a civilized administration of laws."

On March 3, 1884, in *Ex parte Yarborough*, 110 U. S. 651, that portion of the Civil Rights Acts punishing conspiracy "to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States", was upheld as a valid exercise of the power granted to Congress to enforce the Fifteenth Amendment — an Amendment which the Court said "does, *proprio vigore*, substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right." But the Court further held that, independently of this Amendment, it was "essential to the healthy organization of the government itself", that Congress should have the power to protect the citizens in the exercise of such constitutional rights.[1] The case in question involved serious interference in Georgia with negro-voting at a Congressional election; but, as Judge Miller pointed out, there were other forms of interference with elections fully as serious, against which Congress must have power to protect the Government, viz., bribery:

> If the recurrence of such acts as these prisoners stand convicted of are too common in one quarter of the country, and give omen of danger from lawless violence, the free use of money in elections, arising from the vast growth of recent wealth in other quarters, presents equal cause for anxiety. If the Government of the United States has within its constitutional domain no authority to provide against these evils, if the very sources of power may be poisoned by cor-

[1] "The Ku Klux Klan gets no encouragement from the Supreme Court. It was decided yesterday, in the well known Ku Klux Cases that the Federal Government has power to prevent fraud and intimidation at elections. The most remarkable thing about these cases is that the question should ever have been raised." *New York Tribune*, March 4, 1884. But for a limitation of the power of Congress in respect to punishment of election offenses, see *James* v. *Bowman*, 190 U. S. 127, in 1903.

ruption or controlled by violence and outrage, without legal restraint, then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force on the one hand, and unprincipled corruptionists on the other.

This case in 1884 was the last in which the scope of the Civil War Amendments was considered while Waite was Chief Justice; and the decisions of the Court, in the twenty years since Waite's death, have not added substantially to the doctrines established. That the interpretation given by the Court to the Amendments was a surprise to many statesmen, and a disappointment to those who saw, or thought they saw, in them a more comprehensive chart of liberty, has been frequently pointed out. "It was information that was new to the framers . . . when they were told that by those Amendments it was not intended to add anything to the rights of one citizen as against another; that it was not designed to enable Congress to legislate affirmatively or directly for the protection of civil rights, but only to use corrective and restraining measures as against the States so as to secure to the black race the right to be dealt with as equals. It was information that was new, as well as unwelcome, that the provisions creating National citizenship and prohibiting the abridgement of the privileges thereof . . . added nothing to existing rights, but simply provided additional guarantees for such as already existed." Nevertheless, as a historian of the Court has well said: "Now, after the lapse of years, when the temper and spirit in which the text of the Amendments was penned have cooled and the views of men have matured, it is seen that the value of the Court as the great con-

servative department of the Government was never greater than then." [1]

As a result of the above cases, the effect of the Amendments upon the negro race may be summed up as follows. The first section of the Fourteenth Amendment is a prohibitory measure, and the prohibitions operate against the States only, and not against acts of private persons; the fifth section only gives Congress power, by general legislation, to enforce these prohibitions, and Congress may, within bounds, provide the modes of redress against individuals when a State has violated the prohibitions; and though Congress cannot act directly against the States, Congress may regulate the method of appeal to United States Courts by any person whose right under the Amendment has been affected by action of the States. As to the Fifteenth Amendment, though theoretically it is capable of being enforced to a certain extent by direct Congressional action, Congress has, in fact, taken few steps towards such enforcement; and only a few acts of a State or of a State officer have been found by the Courts to violate it. Meanwhile, the Southern States, by constitutional and statutory provisions, which have been in general upheld by the Court, have found methods of limiting the negro right to vote.[2] Of the

[1] See Address of Samuel Shellabarger at the Bar Meeting, on March 26, 1888, on the death of Chief Justice Waite, 126 U. S. app.; *History of the Supreme Court of the United States*, by Hampton L. Carson (1889), 485.

[2] *The Fourteenth Amendment and the States* (1912), by Charles Wallace Collins, 67; *Is the Fifteenth Amendment Void?* by A. W. Mason, *Harv. Law Rev.* (1910), XXIII; *Legislative and Judicial History of the Fifteenth Amendment* (1909), by John Mowry Mathews; *The Fifteenth Amendment*, by William C. Coleman, *Columbia Law Rev.* (1910), X; *Constitutionality of Race Distinctions and the Baltimore Negro Segregation Case, ibid.* (1911), XI. See *American Political Ideas* (1920), by Charles E. Merriam: "In 1890, Mississippi began the process of constitutional limitation of the right to vote which has been carried on until the colored vote in the South has been rendered almost ineffective. This result has been brought about by means of educational requirements, property qualifications and the poll tax. The so-called 'grandfather' clauses were instituted and the whites excluded by other provisions were included by stipulating that descendants of those who

Enforcement Laws enacted in the Reconstruction period, only a small part remain even nominally in force. Of the forty-seven sections of the three statutes, forty-two have either been repealed directly, or rendered obsolete by such laws as the Disabilities Act of 1898, or declared invalid by the Court; and as has been well said, they have disappeared, because "they were in fact out of joint with the times. They did not square with public consciousness, either North or South. They belonged logically to a more arbitrary period. They fitted a condition of war, not of peace, and suggested autocracy, rather than a democracy." [1]

While the Court was thus greatly restricting the National authority under the War Amendments to the Constitution, its trend towards the enlargement of the field and importance of the sovereignty of the States and especially of the State police power was also clearly marked by the doctrine which it now announced in cases arising under the Impairment of Obligation of Contract Clause of the Constitution. As early as 1878, in *Beer Co.* v. *Massachusetts*, 97 U. S. 25, it had shown that it was prepared to go to great lengths in sustaining State legislation interfering with corporate charters; but it was not until 1880 that, in *Stone* v. *Mississippi*, 101 U. S. 814, it rendered the decision which greatly modified the doctrines of the *Dartmouth College Case* as to the degree of control over its cor-

were voters in the year 1867, might be registered." South Carolina adopted such provisions in 1895, Louisiana in 1898, Alabama in 1901, North Carolina and Virginia in 1902, Georgia in 1908. In general, the Supreme Court has upheld these provisions; see *Williams* v. *Mississippi* (1898), 170 U. S. 213; *Giles* v. *Harris* (1903), 189 U. S. 475. In *Guinn* v. *United States* (1917), 238 U. S. 347, however, the "grandfather" clause of Oklahoma was held unconstitutional. See also *The Right of the Federal Courts to Punish Offenders against the Ballot Box*, by D. H. Pingrey, *Amer. Law Reg.* (1890), XXXVII; *Racial Discrimination*, by D. H. Pingrey, *ibid.* (1892), XL.

[1] *The Federal Enforcement Acts*, by William W. Davis, *Studies on Southern History and Politics* (1914).

porations retained by a State; and while admitting that the doctrines of that case had "become so imbedded in the jurisprudence of the United States as to make them, to all intents and purposes, a part of the Constitution itself", it nevertheless read into those doctrines an exception which, never before so distinctly announced, produced a profound effect on the relations of the State toward its corporations.[1] The facts of the case were as follows: lotteries had been illegal in Mississippi prior to 1867, but in that year the "carpet-bag" government chartered a lottery corporation in consideration of the payment of further sums and a percentage of its receipts; when the people of Mississippi adopted their Constitution in 1868, "with a view to the resumption of their political rights as one of the United States", they embodied in it a prohibition of all lotteries. This Constitution, it was claimed by the corporation, was an impairment of the obligation of its contract with the State. The case was argued by Philip Phillips against A. M. Clayton and Van H. Manning. The Court, in a notable opinion by Chief Justice Waite, held that the existence of any contract which might be impaired depended on the authority of the Legislature to bind the State; and that while the Legislature might make irrevocable grants of property and franchises, it could not "bargain away the public health or the public morals", *i.e.* its police power. "Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. . . . The contracts which the Constitution protects are those that relate to property rights, not governmental." Hence, it

[1] See previous cases, *Boyd* v. *Alabama* (1877), 94 U. S. 645; *Beer Co.* v. *Massachusetts* (1878), 97 U. S. 25, and *Northwestern Fertilizing Co.* v. *Hyde Park* (1878), 97 U. S. 659; see, however, *New Orleans* v. *Houston* (1886), 119 U. S. 265, where the Louisiana Constitution itself protected the lottery.

held that a corporation accepting a lottery charter only acquired a permit or license, which was subject to future legislative or constitutional control or withdrawal, if deemed advisable or necessary for the public morality. This doctrine that a State Legislature might not, by contract, limit the future exercise of the State police power over the subject matter of the contract was again set forth in *Butchers Union etc. Co.* v. *Crescent City Co.*, 111 U. S. 746, in 1884. In this case, Louisiana had in 1869 granted to a slaughterhouse company a twenty-five year monopoly (a monopoly which the Court had sustained in the *Slaughterhouse Cases* in 1873), but under the provisions of the State Constitution of 1879, which forbade the existence of a monopoly, the State granted slaughtering rights to another corporation. The Court held that, since the original monopoly had been created by the State in its exercise of the police power, the State might, in behalf of public health, alter its view and destroy such a monopoly, and that its action did not impair the obligation of the contract contained in its prior law. This decision undoubtedly went to great extremes in upholding the authority of the States over rights granted by corporate charters; and it was viewed with apprehension by the conservative portion of the public. "The Supreme Court of the United States has just made a new anti-monopoly decision which is of great importance in its bearing on rights of property and contracts under the Constitution," said the *Nation*. "The curious thing in this case is, that there is nothing on the face of the opinion to show that the public health in New Orleans would be at all safer with the slaughterhouse business in the hands of several companies, than in the hands of one. The Constitutional Amendment, moreover, is distinctly directed at the 'monopoly' feature of the

contract; and, as far as we can see, the only effect of the case is to give any State the right to destroy the obligation of the most solemn contracts, provided the Judges at Washington can extract from its action some shadow of a reason, growing out of what they regard as the cause of 'health' or 'morals.' This is a wide definition of the police power, and gives the Supreme Court and the State Legislatures a power of interference with contracts and property, such as nobody ever dreamed they possessed. Take this decision in connection with that on the legal tender question, and compare the two. Is it not plain that the Judges have adopted a latitudinarian system of construction, which may make lawyers and laymen alike look forward, with less apprehension than they otherwise would, to the infusion of some new blood into the Court, as the consequence of a change of parties?" [1]

[1] *Nation*, Aug. 28, 1884.

CHAPTER THIRTY-FIVE

INCREASE OF NATIONALISM

1881–1887

After a period of seven years without substantial alteration of the personnel of the Court, three changes occurred in the years 1881 and 1882, which seem to have had a profound effect upon the future tendency of its decisions. On January 21, 1881, Judge Swayne resigned, at the comparatively youthful age of seventy-six, and after nineteen years of judicial service;[1] and on March 14, 1881, President Garfield appointed in his place Stanley Matthews of Ohio. Matthews was fifty-six years old; he had served as a United States Attorney under President Buchanan, and had been a Republican Senator from Ohio from 1877 to 1879. He had been previously appointed to a place on the Court by President Hayes in the closing days of his Administration; but the Senate, for political reasons and because of newspaper charges that he was too closely allied with corporate interests, had failed to confirm him. This second nomination was again the subject of great criticism and opposition; but the Senate, finding insufficient grounds for any of the charges, confirmed his appointment on May 12, by the close vote of twenty-four to twenty-three. As has so often happened, later events proved Matthews to be a wise and

[1] See note on the death of Swayne, June 8, 1884, *Amer. Law Rev.* (1884), XVIII, 693.

THE SUPREME COURT IN 1882

Standing: Wood, Gray, Harlan, Blatchford. *Seated:* Bradley, Miller, Chief Justice Waite, Field, Matthews.

upright jurist, and he "lived to hear his detractors sound his praise." [1]

In the same year, on July 25, 1881, Judge Clifford died, at the age of seventy-eight after twenty-three years on the Bench; [2] and in his place President Arthur appointed Horace Gray of Massachusetts, on December 19, 1881. Gray was confirmed, the next day, by a vote of fifty-one to five; he was then fifty-three years of age, and had served as Judge of the Supreme Judicial Court of Massachusetts since 1864, and as Chief Justice since 1873.[3] In 1882, Judge Hunt, who had been incapacitated from serving on the Bench for the past five years, resigned; and President Arthur, to the surprise of most of the Bar, filled the vacant position by the appointment of Roscoe Conkling of New York, on February 24, 1882. This action raised

[1] Hayes sent the name of Matthews to the Senate, Jan. 26, 1881. See violent editorials against Matthews in the *New York Sun*, Jan. 27, Feb. 1, 2, 4, 9, 11, 12, 16, 19, March 7, 19, 23, 24, 29, May 12, 13, 1881; see also *Stanley Matthews*, by Charles T. Grove, in *Great American Lawyers* (1908), VII. In *Life of Rutherford Birchard Hayes* (1914), by Charles R. Williams, II, 327, note, it is said that "the appointment of Matthews was received by a large part of the press with a storm of disapproval because Mr. Matthews had been a corporation attorney. Mr. Matthews proved on the Bench that Mr. Hayes' judgment of his character and fitness was altogether sound."

[2] The *Nation*, July 28, 1881, said as to Clifford: "His mental faculties had been impaired for some time previous to his death, and his place on the Bench has been practically vacant, in consequence. He refused to resign, however, in the hope that the election of a Democratic President might render certain the appointment of a Democratic successor. . . . As a Judge, his industry and conscientious accuracy were remarkable, as well as the rigidity of his political convictions. . . . His partisanship, however, was chiefly the result of the narrow legal view of the relation of the States to the General Government which the old-fashioned New England Democrat always took, and bore no resemblance to the bitter and unscrupulous spirit of faction with which the politics of our day threatens to taint the Judiciary." The *Boston Daily Advertiser*, July 26, 1881, said as to Clifford: "Without brilliant qualities, he had what was far more serviceable, unfailing good sense, clear judgment, boundless capacity for labor, a capacious memory and great love of justice." See also *Amer. Law Rev.* (1881), XV, 686. For a violent expression of the views of Clifford's political opponents, see letters of "Warrington" in *Springfield Weekly Republican*, April 1, 1868, Dec. 18, 1869.

[3] See *Amer. Law Rev.* (1882), XVI, 137; the *Nation*, Dec. 22, 1881, spoke of Gray's "conspicuous fitness for the position"; and see especially tributes to Gray after his death by Charles Francis Adams and by George F. Hoar, in *Mass. Hist. Soc. Proc., 2d Ser.*, XVI, XVIII.

a storm of disapproval. "No nomination could have surprised the country more," said *Harper's Weekly*. "The nomination of Gray has been received with universal approval, that of Conkling with universal amazement," and it stated that Conkling's career as a politician had not inspired the country with confidence in him as a magistrate, and that he was "singularly unfitted to be a Judge." "Mr. Conkling is a lawyer only in name," said the *Nation*, "and must make a poor Judge. He has passed his life in politics. . . . Legal learning, he has not. . . . The mystery is deepened when we reflect that he has been offered the Chief Justiceship of the same Court once before, and declined it as beneath his notice." While this criticism of Conkling's legal ability was probably unfair, nevertheless, his political career had not won for him the confidence of the community. Conkling, however, after being confirmed by the Senate on March 2, by a vote of thirty-nine to twelve, settled the controversy by declining the position. Thereupon, on March 13, 1882, President Arthur, to the complete satisfaction of the Bar, appointed Samuel Blatchford of New York. Blatchford, who was confirmed, March 27, was sixty-two years of age, and had been Judge of the United States District and Circuit Courts in New York since 1867.[1]

Judge Woods died in 1881, and to succeed him President Cleveland appointed Lucius Quintus Cincinnatus Lamar of Mississippi, on December 6, 1887. After opposition in the Senate, Lamar was confirmed, on January 16, 1888, by a vote of thirty-two to twenty-eight; he was sixty-two years of age, and though he had no judicial experience, he had been a professor

[1] *Harper's Weekly*, March 11, 26, 1882; *Nation*, March 2, 1882; *Amer. Law Rev.* (1882), XVI, 335, for article on Blatchford; see also *Nation*, April 23, 1885, "The President and the Judiciary."

of law, a United States Senator from 1875 to 1885, and Secretary of the Interior for the previous three years. It may also be noted that he was the first Democrat appointed on the Court since Judge Field in 1862, and the first Judge who had served in the Confederate Army.

With these changes in its composition, the Court began to show a decided reaction from the policy which it had maintained from 1872 to 1880, with respect to the sovereign powers of the States. A marked disposition to enhance the powers of the National Government by a liberal construction of the Constitution, and to widen the scope of the jurisdiction and powers of the National Judiciary became increasingly apparent; and this distinctly Nationalistic era in its history continued for the next ten years.

With respect to one class of cases, however, those involving the Commerce Clause of the Constitution, the Court had shown from the outset a tendency to limit strictly the sovereignty of the States. With the immense development of the railroad and telegraph systems of the country, the increased facility for the doing of interstate business and the multiplication of commercial corporations after the Civil War, this Clause of the Constitution began to assume an importance in the history of the law which it had never before attained. Up to 1840, the number of cases in Court requiring its construction had only been five, and up to 1860 only twenty, while the subjects of legislation involved had been practically confined to navigation, immigration, slavery and the sale of liquor. By 1870, the number had increased to thirty, in 1880 to seventy-seven, and in 1890 to one hundred forty-eight, involving a great variety of topics — State action relative to peddlers, liquor, railroads, and telegraphs

and immigration and quarantine (both seaboard and internal), and manifold forms of taxation.[1]

Under Chief Justice Chase, only a few interstate commerce cases had been considered, but in each the Court had taken a pronounced stand in favor of State regulation; and in the case which had the most important effect upon the business of the country, the Court had relegated to the States complete control over the great insurance companies of the country, by holding in *Paul* v. *Virginia*, 8 Wall. 168, in 1869, that the negotiation of insurance policies and contracts and the business of insurance was not "commerce" within the purview of the Constitution.

From the beginning of Chief Justice Waite's term of office, however, the Court reversed its policy and upheld the National authority over commerce in practically every case of importance coming before it. In 1873, the Commerce Clause was held to impose considerable limitation on the taxing powers of the States. In *Philadelphia & Reading R. R.* v. *Pennsylvania*, 15 Wall. 232, a tonnage freight tax was held invalid as being a regulation of interstate commerce, when applied to freight originating or carried outside the State: "It is of National importance," said Judge Strong, "that over that subject there should be but one regulating power, for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may; and thus commercial intercourse between States remote from each other may be destroyed. The produce of Western States may thus be effectually excluded from Eastern markets, for though it might bear the imposition of a single tax, it would be crushed under

[1] These figures are taken from *The Commerce Clause of the Federal Constitution* (1898), E. Parmalee Prentice and John G. Egan.

the load of many." The effect of this decision upon the development of the great transcontinental trade, and the unrestricted movement of wheat, ore and coal in this country cannot be overestimated. At the same time, the Court, by its decision in the second case of *Philadelphia & Reading Railroad* v. *Pennsylvania*, 15 Wall. 232, showed that it was not inclined to defeat the State's power to tax, any further than was absolutely necessary; and it upheld a State tax on the gross receipts of railroads, notwithstanding that such receipts were made up in part from freights transported in interstate commerce. "It is not everything that affects commerce that amounts to a regulation of it within the meaning of the Constitution," said Judge Strong. "The ultimate effect of the tax may be to increase cost of transportation, but it is not a tax on transportation itself." Judges Miller, Field and Hunt, however, dissented, holding that a tax on gross receipts was in fact for the privilege of transportation within the border of the States, and they laid down "the broad proposition that by no device or evasion, by no form of statutory words, can a State compel citizens of other States to pay to it a tax, contribution or toll, for the privilege of having their goods transported through that State" and that "the full recognition of this principle is essential to the harmonious future of this country. . . . The interstate commerce today far exceeds in value that which is foreign, and it is of immense importance that it should not be shackled by restrictions imposed by any State in order to place on others the burden of supporting its own government, as was done in the days of the helpless Confederation."

In 1876, the Court held unconstitutional a Missouri statute imposing a license tax on persons peddling goods

of foreign origin, in *Welton* v. *Missouri*, 91 U. S. 275; but it still declined to lay down any general rule as to the extent of the scope of the interstate commerce clause, saying that: "It would be premature to state any rule which would be universal in its application to determine when the commercial power of the Federal Government over a commodity has ceased, and the power of the State has commenced. It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character." [1] In the same year, the Court greatly enhanced the powers of the National Government by upholding the exclusive right of Congress to regulate the subject of immigration as a question of National concern susceptible only of a uniform rule; and in *Henderson* v. *New York* and *Chy Lung* v. *Freeman*, 92 U. S. 259 and 275, it held invalid laws of New York, Louisiana and California, affecting that subject.[2] One result of this decision was the enactment of the first general Immigration law, the Act of August 3, 1882; another was the aggravation of the Anti-Chinese agitation in California, and the disturbances arising out of this troublesome question. The *Nation* indorsed the Court's action, as "sound and wholesome", and stated that since the question of immigration was National, not local, and since State regulation produced confusion and injustice, Congress alone must regulate; but it pointed

[1] In connection with the class of discriminatory legislation involved in this case, see *Commercial Retaliation Between the States*, by Edward B. Whitney, *Amer. Law Rev.* (1885), XIX.

[2] The *New York World*, March 22, 26, 1896, opposed the decision as an infringement of the right of the State to protect itself against pauperism. The *New York Times*, March 21, 24, 29, pointed out that since immigration had been held to be a subject which concerned all the States, Federal legislation was now an imperative duty and that Congress must "take some action giving to the States the protection which they cannot provide for themselves." See also *Edye* v. *Robertson*, 112 U. S. 580.

out that "it appears from the Anti-Chinese outbreak on the Pacific Coast that the decision is felt in California to be a blow at the defences erected by that State against the Mongolian invasion." [1] The continuance of the agitation produced by this decision resulted in the negotiation of the Treaty with China of October 5, 1881, and in the later Chinese Exclusion Acts of 1882, 1884 and 1888. A similar class of State statutes restricting commerce was held invalid in *Inman Steamship Co.* v. *Tinker*, 94 U. S. 238, in 1877, in which a tonnage fee imposed by New York on all vessels entering its ports was held to violate the prohibition of the Constitution against the imposition of a tonnage tax by a State. Judge Swayne, stating that the Commerce Clauses of the Constitution "had their origin in a wise and salutary policy", said that: "The confusion and mischiefs that would ensue if this restriction were removed are too obvious to require comment. The lesson upon the subject taught by the law before us is an impressive one." In 1878, a Missouri statute prohibiting the entry into the State between certain months of the year of any Texas or Mexican cattle, was held in *Hannibal & St. Joseph R. R.* v. *Husen*, 95 U. S. 465, to be an interference with interstate commerce. The Court said that a State "may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce . . . beyond what is absolutely necessary for its self-protection", and it stated that, as the range of the police powers "sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the Court to guard vigilantly against any needless intrusion." This case, in connection with the case on the immigra-

[1] See also *Foster* v. *New Orleans* (1877), 94 U. S. 246.

tion law of New York decided two years prior, showed a distinct advance in the disposition of the Court to restrict the doctrine of the application of the State police power in matters of interstate commerce. A Reconstruction statute of Louisiana requiring all carriers to give equal rights in their conveyances to all persons without discrimination on account of race or color was held invalid, as a regulation of interstate commerce, in *Hall* v. *De Cuir*, 95 U. S. 485, the Court saying, "if the public good requires such legislation, it must come from Congress and not from the States." The right of a State to grant a charter to a telegraph corporation to the exclusion of another such corporation doing an interstate business was denied, in 1878, in *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, Chief Justice Waite saying that the powers granted to Congress by the Constitution "are not confined to the instrumentalities of commerce, of the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. . . . As they were intrusted to the General Government for the good of the Nation, it is not only the right but the duty of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation. The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of intercommunication, but especially is it so in commercial transactions." The fact that Congress, by the Act of July 24, 1866, had authorized any telegraph company to construct its

line along any of the military or post roads of the United States was held to "amount to a prohibition of all State monopolies in this particular." This decision, said a prominent law journal "promises to rank in importance with *Gibbons* v. *Ogden* and the *Dartmouth College Case*." [1] The limits on the power of a State to interfere with interstate commerce carried on by drummers were set forth in an able opinion rendered in 1887 in *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, in which it was stated that "in the matter of interstate commerce the United States are but one country and must be subject to one system of regulations and not to a multitude of systems." The right of a State to prohibit the introduction of liquor from other States by a common carrier was denied in *Bowman* v. *Chicago and Northwestern Ry. Co.*, 125 U. S. 465, in 1888, and an Iowa statute on the subject was held invalid as a regulation of interstate commerce.

Each of these cases marked an advance of National power, and the "centralizing tendencies of the Court" were the subject of much comment by law writers.[2] In fact, there was substantially but one class of cases affecting interstate commerce in which the State powers were upheld, namely, those involving the right of the State to control its bridges, wharves and ferries.[3]

[1] *Southern Law Rev.* (1878), N. S., IV.

[2] *Recent Centralizing Tendencies in the Supreme Court*, by Frederic P. Powers, *Pol. Sci. Qu.* (1890), V.

[3] See *Gilman* v. *Philadelphia* (1866), 3 Wall. 713; *Escanaba, etc. Co.* v. *Chicago*, *Wiggins Ferry Co.* v. *East St. Louis*, and *Parkersburg, etc. Co.* v. *Parkersburg* (1883), 107 U. S. 678, 365, 691; *Willamette Iron Bridge Co.* v. *Hatch* (1888), 125 U. S. 1; and see also *Miller* v. *New York* (1883), 109 U. S. 385, in which a bill in equity to enjoin the construction of the Brooklyn Bridge on the ground of its being an obstruction to navigation was dismissed, the Court holding that Congress had authorized the structure and that Congress had plenary power over navigation under the Commerce Clause. For an interesting commentary on the Court's recession from its position in the *Wheeling Bridge Case*, in favor of the rights of the States, see *The Commerce Clause and the State*, by A. H. Wintersteen, *Amer. Law Reg.* (1889), XXXVII.

None of the Court's decisions on the Commerce Clause, however, so seriously impaired the power of the State or so potently affected the future of the country, as its final decision, in 1886, settling the extent of the control of a State over railroad rates. While National regulation of all railroad rates by virtue of the power contained in the Commerce Clause had been urged by eminent jurists as early as the year 1874, as the only adequate remedy for the evils then existing in the railroad situation, the country and the Courts were not as yet prepared for what then seemed a radical measure.[1] Nevertheless, that such National control was contemplated as an eventual possibility was very interestingly shown in an opinion rendered by Judge Bradley in 1875, in *Baltimore and Ohio R. R.* v. *Maryland*, 21 Wall. 456. In this case, the railroad charter granting a right to build a branch between Baltimore and Washington, fixed the maximum fare at $2.50 and provided that one fifth of the passenger receipts should be paid to the State. It was urged by the railroad that this was an unconstitutional interference with interstate commerce. The Court, however, held to the contrary, and in answer to the query, "has the public no remedy against such exorbitant fares and freights exacted by a State or by a railroad or steamship company?" said that if any "system of exactions be established in these States, as materially to impede the

[1] *Railroad Legislation*, by C. F. Adams, Jr., *Amer. Law Rev.* (1867), II; *Legislative Control of Railroads*, by S. S. Wallace, *Southern Law Rev.* (1874), III; *Legislative Control of Railroads*, by F. L. Wells, *Western Jurist* (1877), XII, saying: "Of late years, this has become a very important question, accidents on railroads and abuses practiced are becoming so numerous." *The Federal Power over Commerce* (1892), by W. D. Lewis; *The Commerce Clause of the Constitution* (1908), by F. H. Cooke; *Law of Interstate Commerce* (1905), by F. N. Judson; *Regulation of Commerce under the Federal Constitution* (1907), by T. H. Calvert; *American Railroad Rates* (1905), by Walter C. Noyes; *Law of Railroad Rates Regulation* (1905), by Joseph H. and Bruce Wyman. *The Legal, Legislative and Economic Battle over Railroad Rates*, by William W. Cook, *Harv. Law Rev.* (1921), XXXV

passage of produce, merchandise, or travel from one part of the country to another, it is hardly to be supposed that the case is a *casus omissus* in the Constitution. Commercially, this is but one country, and intercourse between all its parts should be as free as due compensation to the carrier interest will allow. This is demanded by the 'general welfare' and is dictated by the spirit of the Constitution at least. Any local interference with it will demand from the National Legislature the exercise of all the just powers with which it is clothed." Whether Congress had the power "to establish and facilitate the means of communication between the different parts of the country, and thus to counteract the apprehended impediments referred to," Judge Bradley said, "is a question which has exercised the profoundest minds of the country. . . . But it is to be hoped that no occasion will ever arise to call for any general exercise of such a power, if it exists." [1] In 1877, in the *Granger Cases*, Chief Justice Waite had distinctly stated that until Congress should act, the States had plenary control of rates, whether interstate or intrastate, "so far as they are of domestic concern", and that State regulation of railroads operating within a State was valid, "even though it may indirectly affect those without the State." While the correctness of this statement was widely doubted by many members of the Bar, and received strong criticism in legal journals, it was accepted generally as the law, until, in 1886, in *Wabash, St. Louis and Pacific Ry. Co.* v. *Illinois*, 118 U. S. 557, the Court practically overruled the *Granger Cases* in this respect, and held that a State had no power to regulate railroad rates for transportation within the

[1] See especially *Regulation of Interstate Traffic on Railways by Congress*, by Isaac F. Redfield, *Amer. Law Reg.* (1874), XXII; *Federal Restraints upon State Regulation of Railroad Rates*, by William F. Dana, *Harv. Law Rev.* (1895), IX.

State, when that transportation was a part of an interstate commerce transaction. "The decision is of the highest importance," said the *Nation*. "It utterly demolishes the pretension of State Legislatures and railroad commissions. . . . The principles are very clearly stated, and are fundamental to the existence of the Union and to the existence of trade." [1] As a result of this decision, the railroad question became a truly National problem, and there arose an imperative demand for National regulation. That such regulation of this vitally important means of communication between the States should have been deferred until so late a date as 1887, and that control of railroads crossing State boundary lines should so long have been left exclusively with the States, are singular facts in our National development. From the year 1822, when it enacted the Cumberland Road Bill (which was vetoed by President Monroe) until the year 1862, Congress had undertaken to exercise its constitutional power to regulate interstate commerce in only two classes of subjects — construction of interstate bridges and extension of admiralty jurisdiction. In 1862, Congress incorporated the various Pacific Railroad Companies; but as its exercise of authority in these cases was supposed by many legislators and jurists to arise out of the "war power" or to be based on the Post-roads Clause of the Constitution, the scope of the Commerce Clause in connection with incorporation and regulation of railroads remained still an unsettled question.[2]

[1] *Nation*, Oct. 26, 1886.

[2] In *United States* v. *Union Pacific R. R. Co.* (1875), 91 U. S. 72, the Court said that, at the time of the railroad's charter in 1862, "the war of the rebellion was in progress; and the country had become alarmed for the safety of our Pacific possessions, owing to complications with England"; that the road was a military necessity to protect an exposed frontier; that it was intended to open up "vast unpeopled territory lying between the Missouri and the Sacramento Rivers which was practically worthless without the facilities afforded by a railroad"; that it

In 1866, a mild and tentative move was made towards the exercise of its power of National regulation when Congress, at the instance of the railroads themselves, passed an act authorizing railroad companies chartered by the States to carry passengers, freight, etc., "on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for transportation of the same to the place of destination." In 1873, Congress provided that "no railway within the United States whose road forms any part of a line or road over which cattle, sheep, swine or other animals shall be conveyed from one State to another", should confine animals for longer than twenty-eight hours without unloading for water, rest, and feeding. In the same year, the Senate authorized the Select Committee on Transportation Routes to the Seaboard to investigate and report "upon the subject of transportation between the interior and the seaboard." This Committee reported that the existing defects and abuses were insufficient facilities, unfair discrimination and extortionate charges — the latter due to stock-watering, capitalization of surplus earnings, construction rings, extravagance and corruption in management and consolidations of companies. In 1874, a bill moderately regulating railroads was passed in the House. In 1878, John H. Reagan of Texas introduced in the House a bill to regulate railroad companies engaged in interstate commerce. In 1885, the Senate appointed a committee to investigate the subject of regulation of interstate commerce by railroads,

was necessary for the transportation of the mails, and army and Indian supplies; that it was not then conceived possible to be built by private resources alone; and that though it had actually been built "at less cost of time and money than had been considered possible, no argument can be drawn *from the wisdom that comes after the fact.*"

which reported, January 18, 1886; and as a result of this action, Congress enacted the Interstate Commerce Commission Act of February 4, 1887, and President Cleveland appointed the first Commission, with Judge Thomas M. Cooley as its Chairman. This was the first broad exercise of Congressional power over interstate common carriers — a power which, fifteen years later, was destined to be so greatly extended. It is to be noted that this initial step was regarded with grave apprehensions by the State-Rights Democrats.[1] "I dread to set in motion a doubtful and dangerous power, which will soon become a factor of immense influence in the party politics of the Republic," said Senator Morgan of Alabama, in the debates:

> If Congress, instead of holding the States in check by a constant distrust or denial of their powers, will open their way to the full and free control of the men and corporations engaged in domestic commerce, through civil and criminal laws, and will hold over the States its corrective authority so as to prevent any of them from doing injustice to the other States or their people, the States will soon settle all the knotty problems about long and short hauls, pools, drawbacks, bribes and bonuses, and will close the doors of their penitentiaries upon those who offend against their laws, made to secure the people against wrong and the honest freedom of commerce against injustice and obstruction. . . . I admit all that has been said about the wrongs and injustice that people have suffered through the overbearing insolence and oppression of the railroad companies. Their greed is destructive to the people, and the governments, from whom they derived their powers; but in finding a remedy for this evil, I neither wish to find for the people a new master, remote from them and their influence, in the Congress of the United States, nor to place in the hands of that master a power over their trade and traffic, more dangerous than the power of the railroad companies.

[1] *49th Cong., 2d Sess.*, 400, Jan. 6, 1887.

In 1888, twenty-five years after the first National railroad charter had been granted, the Court, in a striking opinion by Judge Bradley, upheld the power of Congress to establish highways and bridges from State to State as essential to its complete control and regulation of interstate commerce — *California* v. *Central Pacific R. R.*, 127 U. S. 1. Thus was settled the great question of Internal Improvements, which, since the early years of the Nation, had been a topic of such sharp political division.[1]

In connection with National control of railroads under the Commerce Clause, such National regulation received a further extension, through the development of substantive doctrines of equity and commercial law in the decisions of the United States Courts. By reason of the financial crisis, the Granger legislation, and the corrupt manipulations of promoters and stock-jobbers, applications to these Courts for the appointment of receivers and for the liberal exercise of this extraordinary jurisdiction in behalf of judgment creditors, bondholders and mortgagees, increased enormously in number between 1871 and 1878. "No branch of equity jurisprudence has developed more rapidly during the past three years than the law of receivers," said a leading law review in 1876, and another spoke of "the magnitude of the proportion of railroad litigation." [2] In 1879, Chief Justice Waite remarked in *Fosdick* v. *Schall*, 99 U. S. 235, that: "Rail-

[1] See *Power of Congress to Enact Incorporation Laws*, by Victor Morawetz, *Harv. Law Rev.* (1913), XXVI; and see especially, *Wilson* v. *Shaw* (1907), 204 U. S. 24.

[2] See *Right of Action against Receivers*, by James L. High, *Southern Law Rev.* (1876), N. S., II; *Receivers of Railways*, by Leonard Jones, *ibid.* (1878), N. S., IV; *Rights of Material Men Against Mortgages*, *ibid.* (1881), N. S., VII; *Liability of Receivers*, *Western Jurist* (1876), X; *High on Receivers* (1876); *Claims and Equities Affecting the Priority of Railroad Mortgages*, by Leonard A. Jones, *Amer. Law Rev.* (1878), XII; *Liabilities Incurred by Receivers of Railroads*, *ibid.* (1883), XVII; *Railroad Receiverships*, *ibid.* (1886), XIX; *Law of Railroads and Other Corporate Securities* (1879), by Leonard A. Jones.

road mortgages and the rights of railroad mortgagees are comparatively new in the history of judicial proceedings. They are peculiar in their character and affect peculiar interests." And he pointed out that, in receivership proceedings in equity, concessions from strict legal rights must oftentimes be made, to secure advantages that would operate for the general good of all interested. "This results almost as a matter of necessity from the peculiar circumstances which surround such litigation." The case was an interesting example of the flexibility of the law of equity and its adaptation to new and modern conditions of life and business; for the Court held that a railroad receiver might be authorized to pay debts incurred for labor, supplies, and permanent improvements, in priority to the claims of the mortgage bondholders. In 1881, the whole subject of railroad receivership was given thorough consideration by the Court in *Barton* v. *Barbour*, 104 U. S. 126, in which the question was involved whether a railroad receiver could be sued without permission of the Court appointing him. The Court, in holding that such permission must be obtained, stated that railroad insolvencies and receiverships presented a "new and changed condition of things"; that unlike the procedure with reference to insolvent banks, insurance and manufacturing companies, where receivers were appointed to wind up the company and distribute the assets, a railroad receiver was appointed, as a rule, to continue the operation of the railroad; that the public was vastly interested in such a receivership, and it was because of this public right that a Court's receiver should not be interfered with by suits maintained in another jurisdiction. Judge Miller dissented, saying that: "The rapid absorption of the business of the country of every char-

acter by legally authorized corporations, while productive of much good to the public, is beginning also to develop many evils. Not the least of these evils arise from the failure to pay their debts and perform the duties which by the terms of their organization they have assumed." He pointed out that in his Circuit, of the fifty or more railroads, "hardly half a dozen have escaped the hands of the receiver"; that the receiver rarely paid the debts of the company, but frequently injured prior creditors by creating new and superior liens on the property. He believed that no authority or principle could be found to support the Court's decision, and that a plaintiff injured by the operation or breach of contract by a receiver ought to be allowed to sue such receiver in any Court which had jurisdiction.[1]

In 1884, a new form of receivership was originated in the Circuit Courts in the *Wabash Railroad Cases*, through an application made for the first time by the railroad company itself for the appointment of a receiver. This new precedent was soon followed by most railroads in financial straits. The result of this new and modern development of an old equitable doctrine was an enormous increase in the work of these Courts and the assumption of new duties and new responsibilities, presenting many novel questions for decision, and, above all, requiring the control of railroads to be taken from the hands of State commissions and State officials and placed in the custody and direction of the judicial branch of the National Government.[2]

[1] For an early case of the appointment of a receiver to wind up a corporation, see *Covington Drawbridge Co.* v. *Shepherd* (1858), 21 How. 112, and *White Water Valley Canal Co.* v. *Vallette* (1859), 21 How. 414; for one of the earliest cases of appointment of a receiver to run a railroad, see *Bronson* v. *La Crosse and Milwaukee R. R.* (1864), 1 Wall. 405.

[2] See *Wabash R. R.* v. *Central Trust Co.*, 22 Fed. 272, 29 Fed. 623, in 1884; and *Quincy, etc. R. R.* v. *Humphreys* (1892), 145 U. S. 82, *New-Fashioned Receiverships*, by D. H. Chamberlain, *Harv. Law Rev.* (1896), X.

One further form of regulation of the railroads found expression in a series of important cases, in which the extent of the liability of railroad corporations and of other common carriers was settled by decision of the Judiciary, without legislation by Congress. In 1873, in *Michigan Central R. R.* v. *Mineral Springs Manufacturing Co.*, 16 Wall. 318, the Court held that, though a railroad might limit its common law liability by special contract assented to by the consignor, an unsigned general notice on the back of a receipt did not constitute such a contract, even though taken by the contractor without dissent. The parties were not on an equality in their dealing with each other, said Judge Davis: "The law, in conceding to carriers the ability to obtain any reasonable qualifications of their responsibility by express contract, has gone as far in this direction as public policy will allow. To relax still further the strict rules of common law applicable to them, by presuming acquiescence in the conditions on which they propose to carry freight when they have no right to impose them, would, in our opinion, work great harm to the business community." In *New York Central R. R.* v. *Lockwood*, 17 Wall. 357, in a notable opinion by Judge Bradley, the Court held that a common carrier could not stipulate for exemption from responsibility for the negligence of himself or his servants; that the customer had no real freedom of choice, no reasonable and practicable alternative; that the corporations were in a position to control the business, and it was against public policy to allow them to use this public position as a means to exempt themselves from liability for negligence. "The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the Courts. His busi-

ness will not admit such a course." [1] In 1876, in *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174, it was held that public policy would not permit an express company to contract for exemption for loss by fire caused by the negligence of its agent, a railroad company: "The foundation of the rule is, that it tends to the greater security of consignors, who always deal with such carriers at a disadvantage." In 1884, in *Hart* v. *Pennsylvania R. R.*, 112 U. S. 331, the Court upheld a form of contract confining the carrier's liability to a certain valuation of the shipment, even in case of loss by negligence. In 1880, in *Pennsylvania Co.* v. *Roy*, 102 U. S. 451, the liability of a railroad for injury to a passenger riding in a Pullman car was first adjudicated; and in *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34, in 1886, the nature of the sleeping car business was considered, in a case holding invalid a statute of Tennessee taxing sleeping cars running in interstate commerce. In 1884, the fellow-servant rule (established in this country in 1841) was considered in *Chicago, Milwaukee and St. Paul R. R.* v. *Ross*, 112 U. S. 377, in which it was held that the rule should not be extended to apply to persons having supervision or control; and that, therefore, a train conductor was not a fellow servant with other train employees. In

[1] Again in *Southern Express Company* v. *Caldwell* (1875), 21 Wall. 264, the Court considered the question of public policy in relation to common carriers, upholding a clause in an express company contract requiring claims for loss or damages to be made within ninety days. "Common carriers do not deal with their employers on equal terms," said Judge Strong. "There is, in a very important sense, a necessity for their employment. . . . In fact, they are without competition, except as between themselves, and that they are thus is, in most cases, a consequence of advantages obtained from the public. It is, therefore, just that they are not allowed to take advantage of their powers, and of the necessities of the public to exact exemptions from that measure of duty which public policy demands. But that which was public policy a hundred years ago has undergone changes in the progress of material and social civilization. There is less danger than there was of collision with highwaymen. Intelligence is more rapidly diffused. It is more easy to trace a consignment than it was. . . . The business of common carriers is more increased and subdivided. . . . Thus his hazard is greatly increased."

1886, it was held in the *Express Cases*, 117 U. S. 1, that railroad companies were not required at common law to furnish to all express companies equal facilities for doing business upon their passenger trains.

While National control over the instrumentalities of interstate commerce was thus being enhanced and supported by judicial decision, the Court, since 1879, had shown its increasingly Nationalistic tendencies in other directions in a series of important cases.

On May 5, 1879, it rendered a decision in the *Sinking Fund Cases*, 99 U. S. 727, in which it announced for the first time the wide extent of the control which the Government might exercise over corporations chartered by Congress. While the Impairment of Obligation of Contract Clause in the Constitution applied only to the States, it was contended by the railroads, party to these suits, that the Due Process Clause contained in the Fifth Amendment constituted an equally strong limitation upon the power of the Federal Government, and that this latter clause rendered invalid the Act of May 7, 1878, by which statute Congress had amended the charter of the Union Pacific Railroad by requiring it to establish a sinking fund with the United States Treasury for the redemption of the Government loan. The Court, at the outset of its opinion rendered by Chief Justice Waite, remarked that it was indisputable that "the United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen." It, nevertheless, laid down the very broad rule that, under the power to amend the charter, which it had expressly reserved, Congress retained the

power to establish by amendment, "whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs", so long as the amendment should act prospectively and not upon past and executed transactions. And it held that the sinking fund provision was sustainable, on the ground that "it is a reasonable regulation of the administration of the affairs of the corporation, and promotive of the interests of the public and the corporators. It takes nothing from the corporation or the stockholders which actually belongs to them. It oppresses no one, and inflicts no wrong. It simply gives further assurance of the continued solvency and prosperity of a corporation in which the public are so largely interested, and adds another guaranty to the permanent and lasting value of its vast amount of securities." The conclusion thus reached was strongly opposed by three Judges, Field, Strong and Bradley, each of whom in a separate dissenting opinion displayed his fear that the Court's decision would encourage repudiation of contracts. Judge Strong said that the doctrine was a very grave and dangerous assertion. "It is especially dangerous in these days of attempted repudiation, when the good faith of the Government is above all price." Judge Bradley said that: "The initiation of this species of legislation by Congress is well calculated to excite alarm. It has the effect of announcing to the world and giving it to be understood that this Government does not consider itself bound by its engagements. It sets the example of repudiation of Government obligations. It strikes a blow at the public credit. It asserts the principle that might makes right. It saps the foundation of public morality." Judge Field said that the decision would "tend to create insecurity in the title

to corporate property in this country. It, in effect, determines that the General Government, in its dealings with the Pacific Railroad Companies, is under no legal obligation to fulfil its contracts, and that whether it shall do so is a question of policy and not of duty." "I am aware," he said, "of the opinion which prevails generally that the Pacific railroad corporations have, by their accumulation of wealth, and the numbers in their employ, become so powerful as to be disturbing and dangerous influences in the legislation of the country; and that they should, therefore, be brought by stringent measures into subjection to the State. This may be true; I do not say that it is not; but if it is, it furnishes no justification for the repudiation or evasion of the contracts made with them by the government. The law that protects the wealth of the most powerful, protects also the earnings of the most humble; and the law which would confiscate the property of the one would in the end take the earnings of the other."

"This decision lays down certain fundamental principles which we are glad to see again affirmed by the tribunal of highest authority," said the *Nation*. And it criticized Judge Bradley's dissenting opinion as "extremely acrimonious", and said that "such language from a Judge, who joined in reversing the Legal Tender decisions and in laying down the doctrine that Congress may legislate backward indefinitely upon contracts between citizens, is not calculated to promote harmony between the legislative and judicial branches of the Government, or to make an agreeable impression on the public mind." The *Springfield Republican* also considered that the Court had "gone to the root of the matter and taken the general ground, towards which its decisions have been long tending, that grants of

rights and privileges by the Federal Government are revocable, unless an express covenant to the contrary is made." [1]

Announced at a time when corporate pretensions and assumptions of power were rapidly mounting, and when corporate corruption of Legislatures was flagrant, this decision, confirming in the Federal Government enormous powers of control over corporate charters, constituted a warning, not only to railroads, but to all corporations doing an interstate business that, if the Government should ever assume to regulate them by enforcing National incorporation, the scope of its regulation would be subject to few limitations.[2] The decision served also as a complete answer to the charges which had been made from time to time, after the Legal Tender decision, that the Bench had been filled with "railroad attorneys" for the purpose of obtaining decisions favoring these corporations.[3] The absurdity of this charge had been clearly demonstrated when, in 1877, the Court decided the *Granger Cases* sustaining the State maximum rate laws, against the violent opposition of all the railroads and financial interests of the country. The criticism of the Court had, however, broken out again when, on January 6, 1879, only four months before the decision in the *Sinking Fund Cases*, the Court

[1] *Nation*, May 8, Nov. 13, 1879; *Springfield Republican*, May 7, 1879.

[2] An interesting illustration of the power which Congress reserves to itself in granting charters appears in *Newport and Cincinnati Bridge Co.* v. *United States* (1882), 105 U. S. 470, in which a corporation constructing a bridge across the Ohio River at Cincinnati obtained permissive legislation from Congress containing a reservation by Congress of its right to withdraw its assent. The Court held that the franchise thus obtained "was a species of property, but from the moment of its origin was dependent on the will of Congress", and the company ran the risk of its withdrawal. It was, of course, possible that this power might be abused by Congress, but "for protection against unjust or unwise legislation, within the limits of recognized legislative power, the people must look to the polls and not to the Courts."

[3] See *History of the Supreme Court of the United States* (1912), by Gustavus Myers, 528–577, written from the Socialist point of view.

held in *United States* v. *Union Pacific R. R.*, 98 U. S. 569, that the Government had no right to recover for itself or its stockholders the enormous sums lost through the notorious Credit Mobilier frauds in 1864–1866, attendant on the securing of amendments to the railroad charter, and through the corrupt construction, coal and Pullman Car contracts made by the officers and promoters. These frauds had caused a National scandal and had resulted in a Congressional investigation in 1872, and the passage of the Act of March 3, 1873, under which the Attorney-General was directed to institute a suit in equity against stockholders and others who secured stock not paid-up or illegal profits from contracts made with themselves, to compel the restoration of unlawfully obtained property to the corporation or to the Government, "whichever shall in equity be held entitled thereto." The suit so brought finally reached the Supreme Court in 1876, when it was exhaustively argued, and a reargument was had in 1878. Of the charges (which for the purposes of the case were admitted by the demurrer to be true) the Court, in its decision, said that "more unmitigated frauds were never perpetrated on a helpless corporation by its managing directors than are set forth in this bill." Yet, as the Court pointed out, the frauds were committed against the corporation itself, and against such innocent stockholders as had paid in full for their stock, but not against the Government. The corporation, however, was not seeking relief in Court, and "as to the directors and stockholders who took part in these fraudulent contracts they are *particeps criminis* and can have no relief. This class probably included nine-tenths in value of the stockholders." But the Government, on the other hand, was not in a position to obtain relief in equity; it was a creditor under its

contract with the railroad and under its mortgage, and must be supposed to have guarded its rights thereunder. To the Government's contention that it was a trustee for the public and had visitorial powers to correct frauds, the Court answered that such powers could be exercised only in relation to municipal, charitable and religious corporations, or to restrain a private corporation from *ultra vires* acts. To the argument that the Government's rights should be liberally construed, in view of the liberal aid which it had given to the railroad, the Court stated that "it was a wise liberality for which the Government has received all the advantages for which it has bargained, and more than it expected", and though the corporation "since it has grown to a vigorous manhood . . . may not have displayed the gratitude which so much care called for . . . it is but another instance of the absence of human affections which is said to characterize all corporations." And the Court added that "a Court of Justice is not called on to inquire into the balance of benefits and favors on each side of this controversy, but into the rights of the parties as established by law, as found in their contracts, as recognized by the established principles of equity, and to decide accordingly." There was no doubt that the Court was entirely correct in holding that no recognized principle of law authorized the maintenance of any such suits, and as the *Springfield Republican* rightly said: "The Credit Mobilier suit came to the end foredoomed. To turn a bad trade into a good one by means of a subsequent lawsuit is a task as hopeless for Congress as for anybody." This decision, putting an end to the Government's effort to make the guilty parties disgorge for the benefit of a badly looted railroad and a cheated government, was highly unsatisfactory to the

country.[1] That the Court, however, did not intend to allow the guilty to escape, in a case properly maintainable at law, was seen in *Wardell* v. *Railroad Co.*, 103 U. S. 651, in 1881, in which one of the fraudulent coal contracts made between the Union Pacific Railroad and a prospector, in the benefits of which contract the railroad directors were to share under the guise of a separate corporation to whom the contract was assigned, was held to be "utterly indefensible and illegal. . . . Their character as agents forbade the exercise of their powers for their personal ends against the interest of the company." [2] And that the Court was also fully aware of the corrupt lobbyism prevalent in that era, and that it did not intend to allow any of the parties participating in such illegal actions to recover in suits arising therefrom had been shown by its decision, four years before, in 1875, in *Trist* v. *Child*, 21 Wall. 441. In this case, involving a contract for legal services in relation to the passage of an Act of Congress, the Court had said: "The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history." After pointing out that the contract was to obtain the passage of a law to pay a private claim without reference to its merits, "by means, which, if not corrupt, were illegitimate", Judge Swayne had continued (undoubtedly referring to the Credit Mobilier): "If any of the

[1] *Springfield Republican*, Jan. 7, 1879. *The Independent*, Dec. 4, 1873, had said at the time of the defeat of the Government in the Circuit Court in this case that "the best lawyers in Congress last Winter stated that a suit brought in a respectable Court could have no other result. The country may as well understand that when Congress, through lobbying or otherwise, makes improper grants to corporations, the Courts cannot rectify the end."

[2] In 1891, in *Griswold* v. *Hazard*, 141 U. S. 260, the Court upheld a judgment for over sixteen million dollars against the president of the Credit Mobilier, and others.

great corporations of the country were to hire adventurers who make market of themselves in this way to procure the passage of a general law, with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous. . . . The same thing in lesser legislation, if not so prolific of alarming evils, is not less vicious in itself, nor less to be condemned." The country applauded this decision. "The whole American people will cordially thank the Supreme Court for its authoritative expression that services of this kind cannot be the basis of any valid contract for compensation," said the *American Law Review*. The *Nation* said that while it remained to be considered whether the decision would "prove effective to remove wholly, or in any considerable degree, the grossly evil practices which it so strongly condemns", nevertheless, the opinion was stated in "very plain language, coming from the highest tribunal in this country, and language very much needed at this time. . . . The Supreme Court has been at the pains to say, in a manner not likely to be forgotten or misunderstood, that all and the best of the present lobby business in Congress is pernicious, immoral and void; and it has also indirectly read the Court below a pretty strong lecture upon the impropriety of a judicial tribunal lending its aid to carry out these nefarious transactions. . . . A disorganized, incompetent Congress is a continuing, abiding demand for a lobby, and it is a demand which has not hitherto failed, and will not hereafter fail, to produce a supply. Whoever wishes the lobby annihilated must first see to it that the business of Congress shall be conducted in such a way that it can, with reasonable certainty,

be done without a lobby. . . . The conclusion of the whole matter is, that special legislation breeds a lobby, and a lobby breeds fraudulent claims and the corruption of Congress." [1]

In two cases in 1880, the Court took another advanced step in proclaiming a far greater field for Congressional legislation than had hitherto been supposed to exist under the Constitution, when it upheld in sweeping terms the authority of the National Government to protect by legislation its own functions, agencies and sovereignty. In *Ex parte Siebold*, 100 U. S. 371, the Court upheld convictions for ballot stuffing at Congressional elections in Baltimore and Cincinnati, and held valid those sections of the Enforcement Laws of May 31, 1870, and February 28, 1871, which made it a Federal crime for a State election officer at a Congressional election to neglect to perform any duty required of him by State or Federal law. In *Tennessee* v. *Davis*, 100 U. S. 257, an even greater extension of National authority was promoted when the Court sustained the constitutionality of the Act of July 13, 1866, providing for the removal into the United States Courts of any civil suit or criminal prosecution begun in a State Court against a Federal officer acting under any Federal revenue law. The defendant, a deputy

[1] *Lobbying at Washington, Amer. Law Rev.* (1875), IX; *Nation*, April 22, 1875. An agreement to divide fees with a Government officer for securing an appointment as counsel was emphatically denounced in 1880 in *Meguire* v. *Corwine*, 101 U. S. 108: "No legal right can spring from such a source," said Judge Swayne. "They are the sappers and miners of the public welfare and of free government as well. The latter depends for its vitality upon the virtue and good faith of those for whom it exists, and of those by whom it is administered. Corruption is always the forerunner of despotism." The duty of a Government officer to refrain from pecuniary interest in its contracts was forcibly set out by Judge Field in *Oscanyon* v. *Winchester Arms Co.*, 103 U. S. 261, in a suit by the Turkish Consul-General in 1881. "All such positions are trusts to be exercised from considerations of duty and for the public good. Whenever other considerations are allowed to intervene and control their exercise, the trust is perverted and the community suffers. . . . Personal influence to be exercised over an officer of Government, in the procurement of contracts, . . . is not a vendible article in our system of law and morals."

collector, being indicted for murder in the State Court, alleged that the killing was in self-defense and while engaged in discharge of his official duties, and he sought to remove his trial into the United States Court. The Court held that Congress had power to authorize such removal, as indispensable to the enforcement of the National laws and to the supremacy of the National Government in their execution. This decision, said the *Nation*, "practically destroys State Sovereignty with regard to criminal law in a class of cases in which it has hitherto always been supposed to be intact." When this case was considered with *Ex parte Virginia*, in this same year, holding that a State Judge who discriminated against negroes in the impaneling of a jury was indictable under the Civil Rights Act, it was not astonishing that these decisions were profoundly disturbing to those who opposed centralizing tendencies. "They have attracted but little attention at the North," said the *Nation*, "but at the South these decisions have been received with many expressions of hostility, as being aimed at what is left of the once cherished doctrine of State-Rights. They are really, however, of as much importance to one region as to another, and are destined, unless we are much mistaken, to play a prominent part in the future constitutional development of the country. . . . Important and far-reaching changes have been brought in the relation of the State to the General Government." And the *American Law Review* also pointed out how vividly the *Siebold Case* illustrated a growing disposition to enhance the importance of the National Government.[1]

Another form of the extension of the protecting arm of the United States Government to its officials was upheld in *Ex parte Curtis*, 106 U. S. 371, in 1882. This

[1] *Nation*, March 4, 11, 25, 1880; *Amer. Law Rev.* (1381), XV.

case which involved the constitutionality of the Act of August 15, 1876, prohibiting solicitation of money for political purposes from officers or employees of the United States, had aroused great public interest, owing to the scandals growing out of the political assessments levied in the Garfield Presidential campaign. The Court ruled that the law was clearly within the just scope of legislative power, as its object "was to protect the classes of officials and employees provided for, from being compelled to make contributions for such purposes, through fear of dismissal if they refused." The newspapers very generally endorsed this decision and its "calm, luminous and vigorous language"; and referred to "the outspoken popular disapproval of the past assessments, the whole system of which must be rooted out." [1] "Political assessments should be legally proscribed. This is the imperative demand of public sentiment," said the *Independent;* and the *Philadelphia North American* said that it would be received "with little surprise and with very general satisfaction. . . . It constitutes an important step in the direction of civil service reform."

In 1884, the Court delivered the most sweeping opinion as to the extent of Congressional power which had ever theretofore been rendered, when the question of the constitutionality of the Act of Congress, enacted after the war, making Treasury notes legal tender was presented for the first time in *Juilliard* v. *Greenman*, 110 U. S. 421. The right to issue legal tender notes had been sustained in *Knox* v. *Lee*, in 1871, as an exercise of the war power under the Constitution; but that case had not definitely settled the status of notes issued

[1] See *Independent*, Dec. 14, 28, 1882; *New York Tribune*, Dec. 20, 27, 1882; *New York Times*, Dec. 19, 1882; *Philadelphia North American*, Dec. 20, 1882; and see also editorials on the decision in practically all the New York, Boston and Chicago papers.

in time of peace. Meanwhile, since 1872, the composition of the Court had been greatly changed, death or resignation having removed from the Bench, Chief Justice Chase, and Judges Nelson, Davis, Strong, Swayne and Clifford, and their places having been taken by Chief Justice Waite, and Judges Blatchford, Harlan, Woods, Matthews and Gray, while of the former Court only Judges Field, Miller and Bradley still remained. The case now presented had been pending in the Court for five years. It was finally argued on January 2, 1884, by Senator George F. Edmunds and William Allen Butler, against Benjamin F. Butler, James McKeen and Thomas H. Talbot.[1] On March 3, 1884, the Court rendered a decision, through Judge Gray, which was concurred in by all the Judges except Field, and held in the broadest terms that the words "necessary and proper" in the Constitution "include all appropriate means which are conducive or adapted to the end to be accomplished, and which in the judgment of Congress will most advantageously effect it"; that under its power "to borrow money", Congress might "issue the obligations of the United States in such form, and impress upon them such qualities as currency for the purchase of merchandise and the payment of debts . . . as accord with the usage of sovereign governments"; that the power of making

[1] See *Nation*, May 29, 1879: "Messrs. Butler and Chittenden have undertaken to bring before the Supreme Court, by means of a test case, the power of Congress to issue or keep afloat legal tender paper money in time of peace. . . . The contention is that the Act of May 31, 1878, directing reissue of legal tender, is unconstitutional." The *Nation* said, Jan. 8, 1880: "The Supreme Court has denied Mr. Edmunds' motion to advance the Butler-Chittenden legal tender case on the calendar, on the ground that it will not hear constitutional cases in the absence of a full Bench. Judge Hunt's place is now vacant, and we shall therefore have to wait for it to be filled before the case can come up. This is perhaps a wise rule, in view of what happened in the *Hepburn* v. *Griswold* case; but we hope it is not true that Court, as it now stands, is equally divided on this point, and that the new Justice will have the casting vote, for, if so, the temptation to find out the opinion of the lawyer who is nominated, before he gets the nomination, will be strong, if not irresistible."

paper money, issued for such purposes, legal tender for the payment of private debts was "universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the Constitution"; that the power to make the notes of the Government a legal tender in payment of private debts "being one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution", the impressing of such legal tender quality was "an appropriate means, conducive and plainly adapted" to the execution of express powers granted to Congress by the Constitution. "Such being our conclusion in matter of law, the question whether at any particular time, in war or in peace, the exigency is such . . . that it is, as matter of fact, wise and expedient to resort to this means is a political question, to be determined by Congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the Courts." Judge Field in dissenting, lamented that: "What was in 1862 called the 'medicine of the Constitution' has now become its daily bread. So it always happens that whenever a wrong principle of conduct, political or personal, is adopted on the plea of necessity, it will be afterwards followed on a plea of convenience. . . . From the decision of the Court I see only evil likely to follow." The extraordinary length to which the decision carried the implied powers of Congress, and especially the announcement of the doctrine that the National Government possessed all powers belonging to other sovereignties, unless withheld by express constitutional restriction, elicited vigorous criticism from many newspapers and jurists.[1]

[1] Charles Francis Adams in his *Memoirs of Horace Gray* termed the decision: "One of the most significant and far-reaching changes ever worked by judicial construction in constitutional jurisprudence. Largely as the result of his influence,

The financial and industrial effect of the decision also disturbed a large portion of the public who were unconcerned with the radical legal doctrine asserted by the Court. The decision of Judge Strong in the *Legal Tender Cases* of 1871 "strained the Constitution to its extremest limits, and was far from being satisfactory to the legal minds of the country", said the *Independent*, shortly before the decision. "If now the Supreme Court should substantially sustain the Greenback theory as to the legal tender power of Congress, . . . it would seem to us to be creating a new Constitution by the process of interpretation, . . . an improper and dangerous straining of language." [1] After the decision, which more than confirmed its worst apprehensions, the *Independent* said that it was "evident that a very radical change of opinion has occurred in the Court", which it did not consider an improvement, and it termed the Court's new doctrine "a dangerous theory, which makes a new Constitution, in the process of interpreting it." "The decision makes the Constitution . . . different from what it has been supposed to be for now nearly a century. Nobody, until the exigency created by the late war, ever dreamed that Congress had any power to make the debt obligations of the Government a legal tender in the discharge of private contracts; and then it was done on the ground solely of an imperative necessity. . . . The Court now excludes all circumstances and all limitations. . . . This mode of construction, if applied in other relations, would sweep away all the reserved powers of the States, and, at the pleasure of

as exercised and expressed in this case . . . the National Legislature was clothed with broad and undefined Parliamentary powers, covering practically the whole field of sovereignty, in all matters where the exercise of such power was not expressly inhibited to it." *Mass. Hist. Soc. Proc.*, 2d Ser., XVI, XVIII.

[1] *Independent*, Oct. 25, 1883, March 13, 20, 1884.

Congress, reduce them to the condition of mere municipalities." The *New York Times* strongly denounced the decision as one "which, while it must command obedience, cannot command respect, a decision weak in itself and supported by reasoning of the most defective character, inconsistent with the previous decisions of the Court on like issues, and singularly, almost ridiculously, inconsistent with the traditional interpretation of the Constitution, with the spirit of that instrument and its language"; and it stated that the Court had evolved a doctrine "directly opposed to the words of the Constitution, avowedly based upon the theory of sovereignty held at a time when there was not a considerable republic in the world, and bestowing upon Congress a power which it did not dare to claim in stress of war." And the *Louisville Courier Journal* said that the decision had introduced "a new régime. The whole constitutional bulwark is destroyed at one stab, and unbridled license in currency legislation is submitted for constitutional restraint." After stating that it was not clear to a plain democratic mind that foreign customs ought to be a guide to American Judges, in construing American law, it charged that the Court had "violated the letter and spirit of the Constitution", and had "consulted its own conception of political and economic expediency, instead of the commands of the organic law." The *Nation*, in an editorial entitled "A New View of the Constitution", said: "The system of construction adopted in this case is one which weakens the Court itself and enlarges the power of Congress, and makes a long stride in the direction of centralization. . . . The rule adopted by the Court enables Congress to do what it pleases, makes it the judge of what is appropriate to the exercise of the implied powers of the Constitution, and makes the only

limit of these the general doctrine of 'sovereignty', which is either one of arbitrary power, or at the best the authority enjoyed by the English Parliament." An eminent writer in the *American Law Review* spoke of Judge Gray's novel contribution to law in his statement that Congress has powers "incidental to sovereignty"; and he concluded: "It is permitted to those who revere the Court and the Constitution, and believe in public honor, to hope that in future decisions that Court will recur to the doctrines and guidance of Madison, Marshall and Webster, on this question, and restore to our country the blessings of real, honest, constitutional money. . . . Senator Bayard has well said that the Supreme Court has put B. F. Butler on his feet." And a Mississippi Greenbackian wrote that "we feel a just pride in the fact that the Supreme Court has fully sustained our views." [1] Another jurist said, with a pessimistic prophecy which subsequent events did not fulfill: "The Court has fallen, and it is not probable it can ever again act as an effective check upon the popular will, or should it attempt to do so, that it can prevail."

Some newspapers, while regretting not only the legal doctrines of the decision but the encouragement which it would give to inflation of the currency and radical paper money legislation, felt that, as a practical question, Congress could be trusted to deal sanely with the situation. "Fortunately, for the country, the decision involves for the present a theoretical question only," said the *Boston Advertiser*, "but some day the

[1] *The Legal Tender Question*, by H. H. Neill, *Pol. Sci. Qu.* (1886), I; *The Legal Tender Decisions of 1884*, by D. H. Chamberlain, *Amer. Law Rev.* (1884), XVIII; see *ibid.*, *A Reply*, by Thomas H. Talbot; *Nation*, March 6, 20, 1884; *Legal Tender*, by James B. Thayer, *Harv. Law Rev.* (1887), I; Brooks Adams in *Atlantic Monthly* (1885), LV; *Harper's Weekly*, March 15, 1884; *New York Tribune*, March 4, 17, 1884; *New York Times*, March 4, 1884; *Boston Daily Advertiser*, March 4, 1884; *Louisville Courier Journal*, March 5, 11, 1884; *Cincinnati Enquirer*, March 4. 6, 1884; see also *Philadelphia Press*, March 4, 1884; *Philadelphia North American*, March 12, 1884.

question will be severely practical, and then the country must look to Congress rather than to the Supreme Court for the determination of what constitutes sound money." *Harper's Weekly* stated that, since the Court was composed of "a body of very able lawyers and of conservative and patriotic men, and as there is at present no very strong party feeling or pressure of any kind", this opinion must be regarded with great respect and of very great weight. Nevertheless, it could not be regarded but as surprising, it said, that the Court should apparently assert "that the power of Congress is as supreme as that of Parliament, except that it cannot exercise powers expressly withheld." Still, though the decision "recognizes in Congress the constitutional authority of indefinite inflation, the practical reply to the possible peril of such a recognition is that Congress would never have hesitated to use such authority, if it had felt strong enough and had believed that the exigency demanded the action. In an emergency, Congress has always exercised supreme National powers, and the true conservative restraint upon its action lies in the intelligence and honesty of the country." The *New York Tribune* said that: "Timid observers will probably think that this is a dangerous decision, and anti-monopolists will doubtless flatter themselves that it contains the promise of the issue of fiat money, whenever they can get control of Congress. But there is practically no reason for fear, or rejoicing either, for that matter." Later, this paper expressed the hopeful view that, while the decision had been described as "a public misfortune", reviving the greenback agitation and exposing the country to complete debauchment of the currency, "whenever a majority in Congress can find a convenient excuse for inflation, this, however, is not an opinion warranted by past ex-

perience. The greenback agitation died out, not because the people supposed the issue of legal tenders unconstitutional, but because they discovered that the legal tender quality was of no use. . . . (The people and Congress) are not restrained, . . . except by a sense of duty and intelligent care for the consequences. But those restraints ought to be the more powerful, since it appears that the honor and welfare of the Nation depend, not upon any supposed fences by which the people may be penned in, but upon their own good faith and good sense."

In only a few of the more radical Democratic papers was any endorsement of the decision to be found. Representative of these was the *Cincinnati Enquirer*, which termed it one of the most important judicial decisions ever made in this country, "the effects of which will be greater for the good of the toiling millions than those of any other decision made by the Supreme Court. The fact that all the Members of the Court joining in the opinion have been Republicans and were appointed by Republican Presidents bars the money-power from saying it was a Democratic party decision. We are sorry to say that Justice Field dissented from this most righteous determination. . . . By the true friends of the people, Republicans and Democrats, who bore the brunt of battle with the money-power, this edict of our Supreme Court will be received with utmost satisfaction. We will hear no more of inflationists and the 'rag-baby.'"

One immediate effect of the decision was the introduction into Congress of resolves for a Constitutional Amendment to limit the powers of Congress as to the issue of legal tender notes, such measures being proposed by Thomas F. Bayard of Delaware and A. H. Garland of Arkansas in the Senate, and Orlando B.

Potter and Abram Hewitt of New York in the House. "The decision has already become a subject of political discussion, and he must be blind to the profound significance of the great question which has been opened by that decision who fails to see that in some form it must become a fruitful source of agitation," said a leading Democratic paper, which strongly opposed the decision. "People should insist upon having clearly defined constitutional metes and bounds to protect their liberties and rights, instead of depending upon the caprices of the unlimited sovereignty which the Supreme Court dwells upon with such complacency. . . . Without strict limitation, Government becomes a despotism, and as it has steadily moved in the direction of centralization and 'the highest sovereignty', the Republican party has been marking all the stages of its progress by fragments of these safeguards, these muniments of the fundamental law." And an equally strong Republican opponent, referring to the proposed Amendments, said that they showed that the decision had attracted deserved attention by Congress.[1]

Coming only a few months before the Presidential election of 1884, when the Democratic party was returned to power after twenty-four years, the decision may be said to have marked the climacteric of the broad tide of Nationalism which had, with ebbs and flows, been sweeping over American constitutional law.

[1] *Louisville Courier-Journal*, March 11, 1884; *Independent*, March 20, 1884.

Potter's Amendment provided that Congress should not have power to make anything but "gold or silver coin a tender in payment of debts, except after a declaration of war, when the public safety may require it." Bayard's and Hewitt's Amendments were similar except as to the last clause. Garland's Amendment limited the issue of legal tender notes to $350,000,000 except on a two-thirds vote of each House. *48th Cong., 1st Sess.*, 1745, 1756, March 10, 1884. See also *The Proposed Amendments to the Constitution*, by Herman V. Ames, *Amer. Hist. Ass. Rep.* (1896), II.

In 1886, the rights of the United States Government even within the territorial boundaries of the States were broadly upheld in *Van Brocklin* v. *Tennessee*, 117 U. S. 151, in which the power of a State to tax real estate belonging to the National Government was unequivocably denied.[1] And another example of the National control within State boundaries was given, when the Court sustained the plenary right of the National Government to legislate in control and for the protection of its tribal Indian wards located in a State, in *United States* v. *Kagama* (1886), 118 U. S. 375.[2]

In 1887, the Court extended even farther the implied powers contained in the Constitution, by upholding, in *United States* v. *Arjona*, 120 U. S. 479, the validity of the statute punishing the counterfeiting of notes and bonds of foreign governments. It held that, as international comity required that protection be afforded to such foreign securities, and as failure to give such protection would create under international law a right of complaint, "a law which is necessary and proper to afford this protection is one that Congress may enact, because it is one that is needed to carry into execution a power conferred by

[1] In 1876, in *Kohl* v. *United States*, 91 U. S. 367, the right of the United States to take land by eminent domain within a State was first upheld, Judge Strong saying that the right is "the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. . . . It is a right which may be exercised within the States, so far as it is necessary to the enjoyment of the powers conferred upon (the United States) by the Constitution"; and that though it was true that this power of the Federal Government "has not heretofore been exercised adversely, the nonuser of a power does not disprove its existence."

[2] See also *United States* v. *43 Gallons of Whiskey* (1876), 93 U. S. 188. That an Indian born a member of one of the Indian tribes was not a citizen of the United States, even though he had severed his tribal relation, was held in 1884, in *Elk* v. *Wilkins*, 112 U. S. 94. "The National legislation has tended more and more towards the education and civilization of the Indians, and fitting them to be citizens," said Judge Gray. "But the question whether any Indian Tribes or any members thereof have become so far advanced in civilization that they should be let out of the state of pupilage and admitted to the privileges and responsibilities of citizenship, is a question to be decided by the Nation whose wards they are and whose citizens they seek to become, and not by each Indian for himself."

the Constitution on the Government of the United States exclusively. There is no authority in the United States to require the passage and enforcement of such a law by the States. Therefore, the United States must have the power to pass it and enforce it themselves . . . or be unable to perform a duty which they owe to another nation, and which the law of nations has imposed on them as part of their international obligations." Having in the *Legal Tender Case*, in 1884, deduced a power in Congress from its possession by other sovereignties, the Court now held, in 1887, that Congress must be held to possess a power, because of the fact that the States did not possess it. The decision was an interesting example of the very broad views of the Constitution at which the Court had arrived.

CHAPTER THIRTY-SIX

EXPANSION OF JUDICIAL POWERS

1885–1889

In 1885, the Court rendered a decision which marked a new era in the development of the domain of National power and which restricted in a large measure the sovereignty of the States. Since the case of *Osborn* v. *Bank of the United States* in 1824, there had been practically no instance in which the Courts of the United States had sustained an action against a State official for administering an unconstitutional law. On the contrary, attempts to sue such officials had been discountenanced and defeated in many cases, on the ground that they were in violation of the Eleventh Amendment prohibiting suits against a State. Between 1875 and 1885, however, conditions had arisen in many States in this country which made of the Eleventh Amendment simply a shield for State dishonesty. Owing to the devastation due to the Civil War, the corruption of their "carpet-bag" Legislatures and the financial depression after the panic of 1873, many Southern States had attempted to default in the payment of bonds issued or guaranteed by them. The extent of this repudiation had become a National scandal. "Today more than $100,000,000 and, if we include interest, more than $200,000,000 are due to creditors from repudiating States. . . . The whole country is in disgrace by reason of this horrid spectacle," said the *Independent*, in 1883. "Public

morality has suffered from the foul contagion. Municipal corporations have caught the disease. . . . Repudiation is simply the highwayman's morality. When practiced by States, it is power against right. As an exhibit of sovereignty, it is the sovereignty of rascality. State repudiation in this country is a criminality that has behind it millions of offenders. The people are the State and control its action." [1] The Court, nevertheless, in almost every attempt made to enforce compliance by a State with its obligations, was confronted with the Eleventh Amendment. Though determined to uphold principles of honesty in business and to enforce rigidly the Impairment of Obligation of Contract Clause of the Constitution in suits involving private individuals, it had thus far met with an insuperable obstacle in suits involving State officials. The situation was well illustrated by three cases decided in 1883. In *Louisiana* v. *Jumel*, 107 U. S. 711, the Court upheld the right of the State and its officers to be exempt from a mandamus suit requiring officials to apply funds in the State Treasury to payment of State bonds. Judges Field and Harlan vigorously dissented, stating that they would continue to do so, "until the prohibition inserted in the Constitution, as a barrier against the agrarian and despoiling spirit which both precedes and follows a breach of public faith, is restored to its original vigor"; otherwise,

[1] *Independent*, May 3, 1883, Feb. 19, April 30, 1885; *The Supreme Court and State Repudiation*, by John N. Pomeroy, *Amer. Law Rev.* (1883), XVII; see *Can States be Compelled to Pay Their Debts?* by Bradley T. Johnson, *Amer. Law Rev.* (1878), XII; *Suing the State*, by George M. Davie, *Amer. Law Reg.* (1884), XXXII; *The Eleventh Amendment*, by Allen C. Braxton, *Virg. Bar Ass.* (1907), XX; *The Eleventh Amendment*, by William D. Guthrie, in *Magna Carta* (1914); *Suability of States by Individuals*, by Judge Jacob-Trieber, *Amer. Law Rev.* (1907), XLI; *The Eleventh Amendment and the Non-Suability of a State*, by A. H. Wintersteen, *Amer. Law Rev.* (1896), XXX; *Suit Against a State*, by A. D. Lauer, *Amer. Law Reg.* (1893), XLI; *Georgia Bar Ass. Report* (1896), 171; *Washington State Bar Ass. Report* (1887), 127.

they said, "public faith will be the synonym of public dishonesty." [1] In *Cunningham* v. *Macon & Brunswick R. R.*, 109 U. S. 446, the Court held that a bill in equity by mortgage bondholders to foreclose on a railroad whose bonds had been endorsed by the State of Georgia, which had been taken possession of by that State, could not be maintained, since the State was an indispensable party and could not be sued.[2] In *New Hampshire* v. *Louisiana*,108 U. S. 76, the Court refused to sanction an attempted evasion of the Eleventh Amendment by creditors who had assigned their bonds to a State which accepted them simply for the purpose of bringing suit.[3]

While these decisions were undoubtedly wise and in full conformity with the Constitution, they profoundly disturbed the conservative element of the community, which saw in them only encouragement for future municipal and State defaulters; and they even evoked a demand for the abolition of the Eleventh Amendment. "We do not believe in the wisdom or justice of this Amendment at all," said the *Independent*. "It ought to be amended out of the Constitution. . . . The repudiation of State debts under the cloak of this Amendment has become the shame and disgrace of our country, and the proper remedy to arrest this enormous evil is to give to the Federal Courts the power which the Eleventh Amendment took away, and authorize Congress by appropriate legislation to carry that power into full and complete

[1] The premium bond troubles of Louisiana were also involved in *New Orleans Board of Liquidation* v. *Hart* (1886), 118 U. S. 136; see *Wolff* v. *New Orleans* (1881), 103 U. S. 358; *Louisiana* v. *Pilsbury* (1882), 105 U. S. 278.

[2] Creditors of South Carolina were held to be similarly remediless in 1886, in *Hagood* v. *Southern*, 117 U. S. 52.

[3] See, however, *South Dakota* v. *North Carolina*, 192 U. S. 286, in 1904, in which a State was allowed to recover on bonds of another State. As to this case see *John Archibald Campbell* (1920), by Henry G. Connor. and see also severe attack by Camm Patteson in *Virginia Law Reg.* (1905), X, 855.

effect." [1] "The Supreme Court should be able to compel a State to pay its debts. With this power lodged in the Supreme Court and lodged in Congress, the system of State repudiation would come to an end, greatly in the interests of justice." A resolve was actually introduced in the House for the repeal of the Eleventh Amendment and for the grant to Congress of the power to provide by appropriate legislation for enforcement of the obligation of contracts entered into by any of the States of the Union.[2] Fortunately, no such radical move was found necessary; for the Court, in 1885, finally enounced a doctrine as to suits against State officials which, to a certain extent, relieved the situation, and marked a new era in the relations of the National Judiciary and the States. The case in which this momentous decision was made was one of a long series from 1881 to 1887, involving the notorious Mahone-Riddleberger legislation in Virginia, by which that State had practically repudiated $11,000,000 out of a refunded debt of $30,000,000, had cut in half the interest on its outstanding bonds, and had repealed the provisions of law which made coupons on its bonds receivable in payment of taxes.[3] This violation of the State's express agreement with its bond and coupon holders had been held by the Court, in 1881, in *Hartman* v. *Greenhow*, 102 U. S. 672, to be invalid as an impairment of obligation of contract; and in an answer to

[1] *Nation*, March 8, 1883; *Independent*, Feb. 1, March 15, 1883.

[2] *47th Cong., 2d Sess.*, 1356, Jan. 19, 1883. The Amendment was introduced by William R. Moore of Tennessee. It provided for rescinding the Eleventh Amendment and that "The Congress shall have power to provide by appropriate legislation for the legal enforcement of the obligation of contracts entered into by any of the States of the Union."

[3] For details of this and subsequent legislation and the litigation arising out of it, see *Nation*, April 30, 1885; see also *Independent*, March 23, April 5, 12, 19, 1882; *History of the Virginia Debt Controversy* (1897), by William R. Royall; *The Readjuster Movement in Virginia* (1917), by Charles C. Pearson; *The Constitutionality of Repudiation*, by D. H. Chamberlain, and *A Reply*, by John S. Wise, *North Amer. Rev.* (1884), CXXXVIII.

the argument that legislation as to receipt of taxes, binding future Legislatures, might result in crippling the power and resources of the State in time of war or other great calamity, Judge Field had said, quoting the Virginia Court of Appeals: "'At such a time, however, the honored name and high credit secured to a State by unbroken faith, even in adversity, will, apart from all other considerations, be worth more to her in dollars — incalculably more — than the comparatively insignificant amount of interest on a portion of the public debt enjoyed by breach of contract.' The Court thus expressed a great truth, which all just men appreciate, that there is no wealth or power equal to that which ultimately comes to a State when in all her engagement she keeps her faith unbroken." In an effort to avoid the force of this decision, Virginia had proceeded to pass legislation imposing such restrictions upon bondholders as practically to destroy the commercial value of the bonds and coupons; and when bondholders declined to comply with these new restrictions, the State officers attempted to distrain their property in payment of taxes. It was at this point that the Court, in 1885, proclaimed a doctrine which relieved the situation, and which made the provisions of the Eleventh Amendment far less onerous than they had been hitherto supposed to be. In *Poindexter* v. *Greenhow*, 114 U. S. 270, it pointed out that there was a clear distinction between a suit against a State or a State official to compel it or him to perform an obligation of the State, and a suit against a State official to recover damages for an act performed in carrying out an unconstitutional State law; and that no official could claim exemption from personal responsibility for acts committed under such an invalid law. Accordingly, it sustained a suit in detinue

against a city treasurer, and held that the treasurer could not justify, under an unconstitutional State statute, his action in seizing property after the taxpayer had made a valid tender of coupons in payment of his tax. There is an important distinction between the government of a State and the State itself, and governing officials within the sphere of their agency are the State, but outside of their agency are lawless usurpers, individual trespassers, said Judge Matthews, in substance. "This distinction between the government of a State and the State itself is important. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people, from that despotism, whether of the one or the many, which enables the agent of the State to declare and decree that he is the State, to say '*L'État, c'est Moi.*' . . . How else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of the country, State and Federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple and naked; and of communism, which is its twin; the double progeny of the same evil birth." Judges Bradley, Miller, Gray and the Chief Justice dissented, saying that: "A State can only act by and through its constituted authorities and it is represented by them in all the ordinary exhibitions of sovereign power. It may act wrongly; it may act unconstitutionally; but to say that it is not the State that acts is to make

a misuse of terms, and tends to confound all just distinctions. It also tends, in our judgment, to inculcate the dangerous doctrine that the Government may be treated and resisted as a usurpation whenever the citizen, in the exercise of his private judgment, deems its acts to be unconstitutional." They asserted that against unconstitutional oppression by the State or its officers, the citizen had sufficient redress by habeas corpus, by defense to prosecutions, by injunction or by mandamus; but this right, they said, is "a very different thing from the right to coerce the State into a fulfillment of its contracts." That these suits were attempts to coerce the State, they held to be plain. "It is useless to deceive ourselves by an adroit use of words, or by a train of metaphysical reasoning. . . . This is the first time, we believe, since the Eleventh Amendment was adopted, in which a State has been coerced by judicial proceedings at the suit of individuals in the Federal Courts." [1]

With this decision and similar decisions in the next year, 1886, there began a new epoch in the relation of the Federal and State powers. "It marks another revolution in constitutional construction, which will be regarded by some as a virtual change of the Constitution itself, and by others as an adaptation of conflicting parts to the broad requirements of justice," said the *Nation;* and it added, with considerable grounds for the statement: "Since the State can act only through its agents, of whom the tax collector is

[1] See *Antoni* v. *Greenhow* (1883), 107 U. S. 760, and the comment on this case in *Nation,* March 8, 1883; *Ex parte Crouch, Ex parte Royall* (1884), 112 U. S. 178, 181; *Allen* v. *Baltimore & Ohio R. R. Co.* (1885), 114 U. S. 311; *Carter* v. *Greenhow,* 114 U. S. 317; *Pleasants* v. *Greenhow,* 114 U. S. 323; *Marye* v. *Parsons,* 114 U. S. 325; *Barry* v. *Edmunds* (1886), 116 U. S. 550; *Royall* v. *Virginia* (1886), 116 U. S. 572; *Stewart* v. *Virginia* (1886), 117 U. S. 612; *Ex parte Royall* (1886), 117 U. S. 241. See also *Nation,* April 23, May 7, 1885, Feb. 4, 11, March 4, 1886; *Ex parte Ayers* (1887), 123 U. S. 443; *McCullough* v. *Virginia* (1898), 172 U. S. 102.

one, the point [made by the Court] seems to be forced, and although in accord with principles of justice, yet practically a change of the Constitution and one of exceeding gravity." A few weeks later, the *Nation* pointed out how largely the partisan line had broken down in the Court, in the consideration of the broad issue. "The question of State-Rights in its most extreme form was directly involved in this matter, and it might have been expected that the strong Republican bias of our highest Bench would have produced a close approach to unanimity against the traditional Democratic side of that issue. It certainly might have been supposed that the one representative of the Democratic party in the Court would plant himself firmly upon the Eleventh Amendment. . . . In point of fact, Judge Field took the contrary ground, while it was from the lips of a Republican Judge, speaking for three party associates, as well as himself, that there issued a rather heated protest against the attempt of the Court to treat the Eleventh Amendment as a mere jingle of words, to be slurred over by cunning subtleties and artificial methods of interpretation, so as to give it a little compliance, without regarding its substantial meaning." Still later, the *Nation* pointed out with great force, "the great triumph of honesty over fraud", and the immense importance of these cases in bringing constitutional law into conformity with morals. "If they are accepted without resistance, they will make the first victory of the Supreme Court over a really recalcitrant and angry State. . . . Until the present time, the United States has never been victorious in its Judiciary department over a State determined to defy it. . . . There have been many other cases before the Supreme Court in which acts of State Legislatures have been declared unconstitutional and

void, but never, when the State has used all its civil power, its intellect and obstinacy, backed finally by a united public opinion, to frustrate the constitutional demands of hated creditors. These decisions are, then, the first absolutely peaceable triumph of the Constitution and its honest principles over the narrowness, bitterness and often dishonesty of local popular will, and as such they form an epoch in constitutional history. It is a triumph of the regular power of the National Government over the irregular power of the State."

While there were, in subsequent years, some vacillations and inconsistencies in the decisions of the Court involving State officials, the principles laid down in the various *Virginia Coupon Cases* have been, in general, the foundation for an extension of National power over the States which has had a profound effect on the course of American law.[1]

In this connection, it should be noted that, in spite of its tendency to uphold the authority of the Nation in the exercise of political power, the Court showed itself as determined to defend the rights of an individual, when trespassed upon by an officer of the National Government, as when injured by the action of a State officer; and in a memorable opinion in 1882, it had applied to the National Government itself the same principles of distinction between the right to sue a Government officer for his personal illegal acts and the right to sue the Government itself, which it later applied to the State. In *United States* v. *Lee*, 106 U. S. 196, the son of Gen. Robert E. Lee sued to recover possession of eleven hundred acres known as the Arlington estate, which was formerly the property of

[1] *Public Service Rates and the Fourteenth Amendment*, by Nathan Mathews, Jr. and William G. Thompson, *Harv. Law Rev.* (1901), XV.

Mrs. Lee as heir of her grandfather, George Washington Custis Lee. This estate had been bid in by the United States Government at a tax sale during the Civil War, and later used as a National Cemetery, being in the possession and under the control of the defendants in this case, who were military officers placed in charge by the President. In the lower Court, the Attorney-General of the United States, Charles Devens, had, without making the United States a party to the suit, filed a motion to dismiss, on the ground that the property belonged to the Government and was in actual possession of its officers, and that therefore the Court was without jurisdiction to entertain the suit.[1] The Court, in a notable opinion rendered by Judge Miller, considered with great fullness the doctrine of immunity of the Government from suits without its consent, and held that this immunity did not apply when suit was brought against Government officials in unlawful possession of property. "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it." "Shall it be said," he asked, "that the Courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without any process of law and without compensation, because the President has ordered it and his officers are in possession?" To sanction this would be to sanction tyranny. "The evils supposed to grow out of the possible interference of judicial action with the exercise of powers of the Government

[1] The case was argued March 10–13, 1882, reargued Oct. 18, 19, 1882, and decided Dec. 4, 1882. William J. Robertson, W. J. Shipman and S. F. Beach appeared for Lee.

essential to some of its important operations, will be seen to be small indeed compared to this evil." Moreover, said Judge Miller, answering the arguments of the Attorney-General: "Hypothetical cases of great evils may be suggested by a particularly fruitful imagination in regard to almost every law upon which depend the rights of the individual or of the Government, and if the existence of laws is to depend upon their capacity to withstand such criticism, the whole fabric of the law must fail." And he concluded with a striking characterization of the Judiciary, as inherently the weakest of the three branches of the Government: "Dependent as its Courts are for the enforcement of their judgments, upon officers appointed by the Executive and removable at his pleasure, with no patronage and no control of purse or sword, their power and influence rest solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights guaranteed by the Constitution and by the laws of the land, and on the confidence reposed in the soundness of their decisions and the purity of their motives. From such a tribunal no well-founded fear can be entertained of injustice to the Government, or purpose to obstruct or diminish its just authority." In accordance with its opinion, the Court, finding the tax sale illegal, gave judgment for the Lee heirs and ousted the Government from possession. An elaborate dissenting opinion, concurred in by Chief Justice Waite and Judges Bradley and Woods, was given by the new Judge, Gray, in which it was contended that the suit was simply an action, "to invade the possession of the sovereign and to disregard the fundamental maxim that the sovereign cannot be sued."

Though the decision is now regarded as one of the

glories of American law, there were varied views taken of it at the time of its rendition. The greater part of the Bar, however, shared in the feelings which were very strikingly expressed in the *New York World* that: "All self-respecting Americans will rejoice to learn that the Supreme Court has restored to the heirs of General Robert E. Lee the Arlington estate, which for twenty years past has been lawlessly and violently held by the Government without a penny of compensation to the owners. . . . The decision is of especial interest and importance at this time, as reaffirming conspicuously the supreme sovereignty of the Law, 'the State's collected will', above all the heats and fluctuations of popular and sectional passion. The highest tribunal of the Union by its decision, in short, has recognized the wisdom and solidity of a response made by Judge Shipman to one member of the Court, during the proceedings — a response which will, let us hope, become proverbial in American thought and speech. 'Do I understand your position to be,' said one of the Supreme Court Judges to Judge Shipman, 'that if the title to a piece of land on which the Government has set up a lighthouse should be disputed, the claimant might bring an action of ejectment, and if successful, remove the lighthouse?' 'Certainly,' replied the intrepid lawyer. 'That is my position. Far better extinguish all the lighthouses in the land than put out the light of the Law.'" [1]

The decision appealed also to independent journals like the *Springfield Republican*, as being "very sensible law"; and while it "greatly modifies the doctrine that the Government cannot be sued by the private citizen, it correspondingly strengthens the safeguards of pri-

[1] *New York World*, Dec. 5, 1882; *Springfield Republican*, Dec. 7, 1882; *Amer. Law Rev.* (1883), XVII, 444; *New York Commercial Advertiser*, Dec. 5, 1882. See also *Philadelphia Press*, Dec. 6, 1882.

vate right in property. . . . It was in one of the most despotic of those monarchies in the last century that the stubborn miller, whose windmill adjoined, and still adjoins, the palace of Frederick the Great, replied to the covetous efforts of his Majesty to get possession, 'There are still Courts in Berlin, sire', and he relied on the Courts to protect him, as they did." On the other hand, a writer in the *American Law Review* expressed the view that the decision was an infringement on the sovereignty of the United States, and that the rule that the Government cannot be sued has had "its vitality almost wholly emasculated, by the further ruling that the principle cannot be invoked by any officer of the Government against whom, in the discharge of his duty, an action is brought. The reasoning of the majority is certainly forcible, even plausible; but that of the minority through Mr. Justice Gray is invincible. . . . The majority opinion goes so far that a recoil will be the natural result." And a paper of extreme views on the subject of the war bitterly attacked the decision, which, it said, "will strike the man who fought to preserve that very Court, and the bones of whose comrades lie whitening on these plains, with something like a feeling of disgust, if not amazement. . . . The argument used by the Court in granting possession was, in brief, that public officers, acting under the power of sovereign prerogative while the Government was repelling treason, were answerable, after that treason had been crushed, to judicial authority. That authority now revokes the action of the Government done under peculiar and, we think, justifiable circumstances. The future action of this Government's officers will be watched with interest."

Concomitant with the policy of the Court in setting

its face against State repudiation of its bonded obligations was its firm condemnation of all attempts by States to avoid compliance with their solemn legislative contracts in corporate charters containing exemptions from State taxation. While holding that such charters must be construed with utmost strictness against the corporations, and that no exemption from taxation was to be established by implication or other than by the most express phraseology, it continued to adhere to its doctrine, first enounced in 1854, that it was competent for a State Legislature to grant to a corporation an irrevocable tax exemption and that such a grant could not be impaired by a subsequent Legislature. This doctrine had always met with powerful resistance from State officials, and had been the subject of constant and numerous dissents by members of the Court itself. Nevertheless, in 1878, it had been reaffirmed in an eloquent opinion rendered by Judge Swayne in *Farrington* v. *Tennessee*, 95 U. S. 679. "Contracts," he said, "mark the progress of communities in civilization and prosperity. They guard, as far as possible, against the fluctuations of human affairs. They seek to give stability to the present and certainty to the future. They gauge the confidence of man in the truthfulness and integrity of his fellow-man. They are springs of business, trade and commerce. Without them, Society could not go on. Spotless faith in their fulfillment honors alike communities and individuals. Where this is wanting in the body politic, the process of descent has begun, and a lower plane will be speedily reached. To the extent to which the defect exists among individuals, there is decay and degeneracy. . . . A Republican government can have no foundation other than the virtue of its citizens. When that is largely impaired, all is in peril. It is needless to

lift the veil and contemplate the future of such a people. History but repeats itself. The trite old aphorism that 'honesty is the best policy' is true alike of individuals and communities. It is vital to the highest welfare." [1] But while still refusing to invalidate these tax exemptions, the Court plainly showed, in the trend of its decisions, a reflection of the public sentiment which was being aroused by the arbitrary, corrupt and monopolistic activities of many of the corporations of the day. For as in the *Granger Cases* and in the *Sinking Fund Case* it evidenced its intention to strengthen the control of both State and National Governments over such corporations, so now it displayed an equally marked tendency to restrict the scope of corporate tax exemptions and to uphold the State's denial of their legal existence, wherever possible. As Judge Brown said, later: "Exemptions from taxation are not favored by law. . . . It is not too much to say that Courts are astute to seize upon evidence tending to show that such exemptions were not intended, or that they have become inoperative by changes in the original constitution of the companies." [2] Here, as elsewhere throughout the law, the Court was responsive to the spirit of the times and to the new and constantly increasing demand for the subordination of private rights and privileges to the interests of the public welfare.

[1] See *Nation*, Jan. 2, 1879; *Washington University* v. *Rowe* (1869), 8 Wall. 439, and *Humphrey* v. *Pegues* (1873), 16 Wall. 244; *Exemption from Taxation by Legislative Contract*, by James F. Colby, *Amer. Law Rev.* (1878), XIII.

[2] *Yazoo & Miss. River Valley R. R.* v. *Adams* (1901), 180 U. S. 1, 22; see also especially *Morgan* v. *Louisiana* (1876), 93 U. S. 217; *Washington University* v. *Rouse* (1869), 8 Wall. 439; *Humphrey* v. *Pegues* (1873), 16 Wall. 244; *Sioux City Street Ry. Co.* v. *Sioux City* (1891), 138 U. S. 98; *Ford* v. *Delta & Pine Land Co.* (1897), 164 U. S. 662; *Grand Lodge of Louisiana* v. *New Orleans* (1897), 186 U. S. 143; *Covington* v. *Kentucky* (1899), 173 U. S. 231; *Legislative Tax Exemption Contracts*, by Ernest W. Huffcut, *Amer. Law Rev.* (1891), XXIV; *The Nature of Tax Exemptions*, by Frank J. Goodnow, *Columbia Law Rev.* (1913), XIII.

Another form of repudiation continued to be sternly discountenanced by the Court, in a long series of opinions in which it declined to modify its doctrine, announced as early as 1863, with reference to municipal bonds, valid when issued but subsequently held illegal by State Courts. During Chief Justice Waite's term of service, nearly two hundred cases involving such bonds were decided by the Court, and in very few instances were the efforts of the municipalities to escape payment successful. Attempts to avoid payment of bonds, by the creation of a new municipal corporation in place of the corporation issuing the bonds, were dealt with by the Court in *Barkley* v. *Levee Commissioners* and *Broughton* v. *Pensacola*, 93 U. S. 258, 266, in 1876; and an attempt by the city of Mobile to escape payment of its debts, by dissolution of the municipal corporations and legislative creation of a new corporation containing less territory but substantially the same population and property, was defeated in *Mobile* v. *Watson*, 116 U. S. 289, in 1886.[1] In *Louisiana* v. *Pilsbury*, 105 U. S. 278, the contract contained in bonds issued by the city of New Orleans was held to be impaired by extraordinary legislation which provided for bonds the time of whose payment both as to principal and interest was to be determined by chance in a lottery.[2]

[1] A singular case involving the failure of a county in Missouri to pay its bonds was *Findlay* v. *McAllister* (1885), 113 U. S. 104, in which a bondholder was held to have good cause for an action for damages against persons conspiring as "the Taxpayers' Association of Scotland County" to prevent by threats, etc. sale of property seized under levy. To hold otherwise, said Judge Woods, "would allow an organized band of conspirators fraudulently and maliciously to obstruct and defeat the process of the Courts and render a judgment nugatory and worthless. Such a conclusion would be contrary to the principles of the common law and of right and justice."

[2] In a few cases, the Court found itself forced so to construe the law and the Constitution as to permit municipalities to escape payment of their honest debts; but in most of such instances, it expressed its regret that such should be the result of its decision. In *Meriwether* v. *Garrett* (1880), 102 U. S. 472, it held that the public

One result of this firm policy of the Court in requiring cities and counties to pay their debts was to awaken in parts of the country — notably in Missouri, Iowa, Kansas, Wisconsin, Michigan and the Southern States — a considerable feeling of hostility, which led to the introduction of a bill in Congress, in 1878, providing that no municipal or public corporation should be sued in the United States Courts. Such jurisdiction, it was said, "leads to centralization" and "deprives a State of a free and right exercise of its sovereignty." Congress took no action; and the general public agreed with the *Nation* in saying that: "Instead of interfering to make repudiation easy for these bodies, it is the plain duty of Congress to arm the National Courts with whatever additional powers are necessary to be used in bringing them to a sense of their legal obligations." [1] The antagonism to these Courts, on account of their decisions in the municipal bond cases committing county officials to jail for refusal to levy taxes to pay bonds, remained active in several States for many years; and as late as 1893 the Governor of Missouri sent a message to the State Legislature, reviewing the situation with respect to such imprisoned officials, and recommending that action should be taken by the State "to assert the outraged dignity of the State against usurpation of power by the Federal Judiciary." [2]

property and taxes of the City of Memphis, whose charter had been repealed and whose property was in the hands of a receiver appointed by the State, were not liable to respond to a suit for payment by bondholders; Judges Strong, Swayne and Harlan dissented on the ground that the State receivership legislation, "certainly very extraordinary and unprecedented in the history of the country", was an impairment of the obligation of the contract contained in the bonds issued by the city. See also *Amy* v. *Shelby County Taxing District* (1885), 114 U. S. 387; *Louisiana* v. *New Orleans* (1883), 109 U. S. 285.

[1] *Nation*, Jan. 2, 1879. "The Federal Judiciary and the Repudiators." The *Nation*, on Aug. 8, 1878, had made a suggestion that Congress appropriate no public money for the benefit of counties guilty of fraud or refusing to pay interest on their loans", citing certain counties and townships in Kansas as "shameless defaulters."

[2] *Amer. Law Rev.* (1893), XXVII, 393.

While the Court, between 1878 and 1889, was thus steadily strengthening the political and governmental powers of the Nation and its control over the industrial and economic interests of the country, these powers and this control were being further enhanced by the immense increase in litigation which came within the jurisdiction of the inferior Courts of the United States — an increase caused, not merely by the growth of subjects of litigation, but also by the extension of National jurisdiction through Congressional action. Mention has already been made of the volume of cases in these Courts which arose out of municipal bond repudiation, out of the Reconstruction Laws, out of the enlargement of the scope of admiralty, out of State railroad regulation, out of railroad receiverships, and out of the insistence by litigants on testing the validity of State statutes under the Fourteenth Amendment.[1] Notwithstanding all this increased burden upon the United States Courts, Congressional legislation, between 1867 and 1885, had opened still further fields of jurisdiction.

An early attempt by Congress to enlarge the jurisdiction of the Supreme Court itself had been defeated by a decision of vast importance rendered by the Court, in 1875 in *Murdock* v. *Memphis*, 20 Wall. 590, a case which involved a question whose decision seemed destined to affect profoundly the whole subsequent legal

[1] The increase in litigation in the United States Courts had resulted in demands for reorganization of the National Judiciary system and for relief of the Supreme Court from its overcrowded docket. Projects of relief introduced in Congress at various times from 1876 to 1884, failed to pass, though advocated by the American Bar Association and by the Bar in general. It was not until the Circuit Court of Appeals Act of 1891 that any adequate remedial legislation was secured. See articles in *Amer. Law Rev.* (1876), X; (1884), XVIII; (1889), XXIII; *Amer. Law Reg.* (1881–82), XXIX, XXX (1884), XXXII; *Nation*, Feb. 10, 1876, May 18, 1882, April 24, 1884; *North Amer. Rev.* (1881), CXXXII; and see especially full summary of the effort for reform of the Judiciary system, *Amer. Bar Ass. Journ.* (1921), VII, 24 *et seq.*

history of the country and which arose as follows. By the Act of February 5, 1867, Congress in amending the original Judiciary Act of 1789, had enacted (among other changes) a new section in place of the famous Twenty-Fifth Section relative to writs of error to State Courts. It had omitted the last clause of the old Act which had in express terms limited the power of the Supreme Court, in reversing the judgment of a State Court, to a consideration of errors on the face of the record and of errors respecting Federal questions only. The issue presented was, whether Congress, by this omission, intended that the Court should, on future writs of error, examine into *all* errors in the record, whether respecting Federal questions or otherwise. If the Court should decide that this was the intention, not only would its work be enormously increased, but the class of matters coming within its jurisdiction and presented for decision would be revolutionized. Such was the importance of the case that, after it had been first argued, January 21, 1873, by W. J. Scott and J. B. Heiskell against W. T. Otto, B. M. Estes, J. M. Carlisle and J. D. McPherson, it was reargued at the request of the Court on April 2, 3, 1873, by the same counsel and by Philip Phillips and Benjamin R. Curtis, who "in response to the invitation of this Court", appeared as *amici curiae*. The contention was made by counsel that the new statute was passed just after the overt acts of rebellion had been suppressed by the force of Federal arms, but while it was uncertain how far the spirit of opposition, though covert, yet remained both alive and active, and that the new statute showed an apprehension that Federal justice would be obstructed by local and State animosities and revenges, and that the record in State Courts might artfully suppress the fact that Federal questions

had been actually adjudicated. It was pointed out that other Congressional legislation about the same time, providing for extension of the right of habeas corpus and for removal into the United States Courts in case of the existence of local State prejudice, showed a general intention on the part of Congress to enlarge the jurisdiction of those Courts. That these contentions were correct, and that it was the real intention of Congress to provide, by this amendment, that every question passed on by the State Court should be open for reconsideration in the Supreme Court, is highly probable. Undoubtedly, the whole trend of the legislation of the period sustained this view. The Court, nevertheless, in an opinion by Judge Miller rendered on January 11, 1875, over one and a half years after the argument, held that Congress, by dropping the clause from the old Judiciary Act, had not intended to change the law as it had existed for eighty years; and that, if it had actually intended such a change, it would have legislated in express and affirmative terms.[1] In reaching this conclusion, it is evident that the Court was largely influenced by a consideration of the alarming results which would have followed from the opposite interpretation of the statute. For it stated that if a party could bring here, for decision on all matters involved, any case from a State Court, by merely raising a Federal question, and if the Court, on examination in conference, finding the Federal question clearly untenable, were obliged to examine the rest of the record and decide all points involved, it would follow that there would be "no conceivable case so insignificant in amount or unimportant in principle that a perverse and obstinate man may not bring it to this Court by

[1] See *The Enforcement of State Law by State Courts*, by Henry Schofield, *Illinois Law Rev.* (1908), III.

the aid of a sagacious lawyer raising a Federal question in the record — a point which he may be wholly unable to support by the facts, or which he may well know will be decided against him, the moment it is stated." Hence, it said, it would require "a very bold reach of thought, and a readiness to impute to Congress a radical and hazardous change of a policy vital in its essential nature to the independence of the State Courts, to believe that that body contemplated or intended" such a result. Judge Bradley in dissenting, believed that Congress did intend exactly this "radical" change, however unwise it might be, and that the omission of the original clause from the Judiciary "meant something and effected something." [1]

While this decision restricted the jurisdiction of the United States Courts, the legislative policy which Congress had adopted during the war, and which it now continued to pursue, led to extension of such jurisdiction in many directions. By the Acts of March 3, 1863, and of April 9, May 11, and July 27, 1866, Congress had authorized the removal into these Courts of any prosecution in a State Court based on acts committed under National authority in suppressing the Rebellion; and these statutes had been vigorously upheld in *Mayor of Nashville* v. *Cooper*, 6 Wall. 247, in 1868, the Court saying: "It is the right and the duty of the National Government to have its Constitution and laws interpreted and applied by its own judicial tribunals. . . . The decisions of the Courts of the United States, within their sphere of action, are as conclusive as the laws of Congress made in pursuance

[1] For other examples of decisions by which the Court sought to relieve itself of the rapidly growing volume of cases on its docket, see *State Railroad Tax Cases* (1876), 92 U. S. 575, in which a rule was laid down to govern the granting of injunctions against State tax laws by the Circuit Courts; and see *Hawes* v. *Oakland* (1882), 104 U. S. 450, laying down the rule for suits brought by stockholders against their own corporations; *Huntington* v. *Palmer* (1882), 104 U. S. 482.

of the Constitution. This is essential to the peace of the Nation, and to the vigor and efficiency of the government." [1] By the Act of March 2, 1867, Congress gave to plaintiffs the right to remove a case from the State Courts under certain conditions, that right having theretofore been confined to the defendants; and the Court held, in *Chicago & Northwestern Railway Co.* v. *Whitton*, 13 Wall. 270, in 1872, that such a right of removal was not properly an exercise of appellate jurisdiction, "but rather an indirect mode by which the Federal Court acquires original jurisdiction of the cause"; and that there was no constitutional objection to such a provision, "where a plaintiff discovers, after suit brought in a State Court, that the prejudice and local influence, against which the Constitution intended to guard, are such as are likely to prevent him from obtaining justice."

By the Act of March 3, 1875, passed two months after the decision in *Murdock* v. *Memphis*, Congress still further enlarged the powers of the Circuit Courts by granting to them for the first time jurisdiction in all suits arising under the Constitution and laws of the United States. This statute greatly increased the classes of cases removable from the State into the National Courts; and since, in cases taken on writ of error or appeal from the Circuit Court to the Supreme Court, all questions whether Federal or State, presented on the record were passed upon by the latter Court, Congress thus practically enabled that Court to review matters, which the decision in *Murdock* v. *Memphis* had tended to eliminate from its consideration. Naturally, the United States Courts soon be-

[1] See *Justices* v. *Murray* (1870), 9 Wall. 274, in which the Court held that so much of the Act of March 3, 1863, as authorized removal of a case after judgment, for retrial in the Federal Court on the facts and the law, was unconstitutional, as a violation of the Seventh Amendment; as to this case, see *New York Times*, March 21, 1870. See also *McKee* v. *Rains* (1870), 10 Wall. 22.

came overwhelmed with litigation.[1] Examples of two classes of cases which were thus brought within the National control, were illustrated by decisions in the following important cases, in 1884 and 1885. In *Ames* v. *Kansas*, 111 U. S. 449, which was an action brought by the State of Kansas to invalidate the consolidation of one of its corporations, the Kansas Pacific Company, with the Union Pacific Railway Company, the Court held that a suit brought by a State in a State Court was removable into the Circuit Court; and that the fact that the Supreme Court had original Federal jurisdiction of suits by a State did not exclude Congress from granting similar jurisdiction to inferior Federal Courts. "It rests with the Legislative department of the government to say to what extent such grants shall be made," said Chief Justice Waite, "and it may safely be assumed that nothing will ever be done to encroach upon the high privileges of those for whose protection the constitutional provision was intended." In the *Pacific Railroad Removal Cases*, 115 U. S. 1, the Court held that a suit against a railroad chartered by the United States

[1] Early Removal Acts had grown out of fear of prejudice in State Courts against the National Government. See Act of Sept. 24, 1789, Act of Feb. 2, 1815, Act of March 9, 1815, Act of April 27, 1816, growing out of opposition of New England to the War of 1812; Act of March 2, 1833, growing out of nullification in South Carolina; Act of July 27, 1866, and Act of March 2, 1867, growing out of conditions in the Southern States; see also Civil Rights Act of March 1, 1875. *Gordon* v. *Longest*, 16 Pet. 97, in 1842 was the first instance in which a State Court refused to a party a right to remove his cause to the Circuit Court of the United States; and the Court had said in that case: "One great object in the establishment of the Courts of the United States and regulating their jurisdiction was to have a tribunal in each State presumed to be free from local influence, and to which all who were non-residents or aliens might resort for legal redress. But this object would be defeated if a State Judge, in the exercise of his discretion, may deny to the party entitled to it a removal of his cause."

See *Removal of Cases*, by J. F. Dillon, *Southern Law Rev.* (1876), II; *Removal of Suits from State to Federal Courts*, by Allen B. Magruder, *Amer. Law Rev.* (1878), XIII. *Removal of Causes from State Courts to Federal Courts*, by John F. Dillon was published in 1877, and a third edition in 1881, of which the *American Law Review* (1881), XV, said: "The expansion of the monograph, from 105 pages in 1877 to 168 pages in 1881, illustrates the appalling growth of case law in this country, and the strong tendency of the Federal Judiciary to assert vigorously their own jurisdiction."

arose "under the laws of the United States", and was therefore removable into the Circuit Court. The decision had important results in the Western States, as it transferred the trial of tort cases to a large extent from the State to the United States Courts.[1]

The enhancement of the National power through these Removal Acts and the ensuing decisions of the Court aroused a considerable sentiment of jealous opposition in the States, and their resentment at the extent to which litigants, especially corporations, took advantage of the right to remove suits into the United States Courts led to the enactment in many States of statutes providing that no corporation should be permitted to do business within the State, without first filing an agreement not to remove any case from a State Court. The constitutional validity of these State laws was tested as early as 1874, and in *Home Insurance Co.* v. *Morse*, 20 Wall. 445, such an act of Wisconsin relative to fire insurance companies was held invalid, the Court deciding that both individuals and corporations had a right to appeal to the Courts of the United States, which right was protected by the Constitution; and in 1887, this doctrine was reaffirmed in *Barron* v. *Burnside*, 121 U. S. 186, in which the Court held invalid a statute of Iowa relative to removal of suits by foreign corporations. The decision was attacked by many writers as hostile to the interests of the Western States, which had "particularly suffered from foreign corporations, especially railroad and insurance." [2]

Another enlargement of the powers of the National

[1] See also for construction of the Removals Act of 1875, *Starin* v. *New York* (1885), 115 U. S. 248; *Detroit* v. *Dean* (1883), 106 U. S. 537.

[2] *Recent Centralizing Tendencies in the Supreme Court*, by Frederic P. Powers, *Pol. Sci. Qu.* (1890), X. It has not been easy to reconcile the various opinions of the Court on the right of the States to legislate as to removals — see *Doyle* v. *Continental Insurance Co.* (1877), 94 U. S. 535; *Donald* v. *Phil. & Reading R. R.* (1916), 241 U. S. 329; *The Constitutionality of Statutes Prohibiting Resort to the Federal Courts*, by Frank Lacy, *Amer. Law Rev.* (1909), XLII.

Judiciary was made by Congress by the Act of March 3, 1885, in which it restored the right of appeal to the Supreme Court in cases of habeas corpus arising out of the restraint of any person in violation of the Constitution or laws of the United States. This right of appeal had been in abeyance for seventeen years, ever since the Act of February 5, 1867, granting such an appeal had been repealed in 1868, at the time of the *McCardle Case.* The effect of this repeal, enacted in the passionate era of Reconstruction, had been disastrous in many ways, and most especially since it left final action in habeas corpus cases with the District and Circuit Judges, unrestrained by decisions of the Supreme Court. These inferior Court Judges, particularly in the Southern and Western States, had gone to so great lengths, in the issue of writs on behalf of persons restrained by State authority, that their assumption of power had greatly alarmed those who believed in the necessity of preserving intact the respective lines of National and State authority. The Federal Judges have asserted power "to annul the criminal judgments of the State Courts, and to pass finally and conclusively upon the validity of the criminal codes, the police regulations, and even the Constitutions of the States", wrote a noted jurist in 1884.[1]

[1] *Abuses of the Writ of Habeas Corpus,* by Seymour D. Thompson, *Amer. Law Rev.* (1884), XVIII; *Abuse in Habeas Corpus Cases by Federal Judges, Amer. Law Rev.* (1896), XXX, 254; *Report of Committee on the Judiciary,* March 8, 1884, *Amer. Law Reg.* (1884), XXXII. See *Ex parte Parks* (1876), 93 U. S. 18, for history of habeas corpus in the Federal Courts. By the original Judiciary Act of 1789, the power of the Federal Judges to issue writs of habeas corpus did not extend to persons restrained by State authorities or unless in custody under or by color of the authority of the United States or committed for trial before some Court of the United States. The first extension arose out of Nullification in South Carolina, the right of habeas corpus being extended by the Act of March 2, 1833, to any persons restrained "from any act done or omitted to be done in pursuance of a law of the United States or on any order of any Judge or Court thereof." The next extension arose out of the conflict with Great Britain in the *McLeod Case,* when by Act of Aug. 29, 1842, foreigners, restrained by a State or other Court in violation of international rights, were given right to habeas corpus, with appeal to the

Consequently, Congress was called upon for action, and a bill was reported restoring the right of appeal to the Supreme Court, the House Committee on the Judiciary stating in its report that: "The jurisdiction assumed by Federal Judges, if allowed to continue, and continue unrestrained and unquestioned, cannot fail to bring the two judicial systems into serious and powerful conflict unless the State Courts shall tamely submit to be shorn of the jurisdiction they have exclusively exercised since the Government existed. . . . With this right of appeal restored, the true extent of the Act of 1867 and the true limits of the Federal Courts and Judges under it will become defined, and it can then be seen whether further legislation is necessary." [1]

During the entire fifteen years of Waite's term of office, the Court's growing hesitation to limit the powers of the National Legislature was further illustrated by the fact that in only eight cases did it exercise its function of declaring Acts of Congress unconstitutional. Three of these cases related to Reconstruction legislation, already noted. Of the other five, only one — the *Trade Mark Cases*, 100 U. S. 82, decided in 1879 — had an important effect upon the history or development of the country; in this case the Act of Congress providing for registration of trademarks was held invalid, on the ground that its scope was not confined to the only subject on which Congress had power to legislate, namely, commerce between the States and with foreign nations; and the Court again expressed its regret at being obliged to take this action, saying that: "A due respect for a coördinate branch of the govern-

Supreme Court. The Reconstruction Act of Feb. 5, 1867, extended right of habeas corpus to "all cases where any person may be restrained of his or her liberty in violation of the Constitution or of any treaty or law of the United States."

[1] See as to this Act of March 3, 1885, *Ex parte Royall* (1886), 117 U. S. 241; *Cunningham* v. *Neagle* (1890), 135 U. S. 1.

ment requires that we shall decide that it has transcended its power, only when that is so plain that we cannot avoid the duty." [1] Nevertheless, though the Courts' action in this respect was highly circumspect, it gave rise, at this period to a more careful and scholarly examination into the legal and historical basis for the exercise of the power of the Court to pass upon the validity of an Act of Congress, than had hitherto been made. As will be recalled, the existence of this power had been attacked by the Democrats (the Republicans of those days) in 1802 and again in 1819, and by the Republicans in 1857 and 1867, but on all these occasions the attack had been made by politicians and had been based on political prejudices. In 1885, the basis of the power became subject to investigation and consideration by jurists of distinction; and a number of valuable articles were written presenting each side of this controversy—the beginning of a long line of publications which has lasted to the present day.[2]

[1] The cases holding Federal statutes unconstitutional during Waite's term were: *United States* v. *Reese* (1876), 92 U. S. 214, one of the Reconstruction laws; *United States* v. *Fox* (1878), 95 U. S. 670, a statute making criminal actions wholly within the domain of the State police power, such as the fraudulent incurring of debts; *Trade Mark Cases* (1879), 100 U. S. 82; *Kilburn* v. *Thompson* (1881), 103 U. S. 168, a House Resolution punishing a witness for contempt, in relation to a matter over which Congress had no jurisdiction to inquire; *United States* v. *Harris* (1883), 106 U. S. 629, a Reconstruction law; *Civil Rights Cases* (1883), 109 U. S. 3, a Reconstruction law; *Boyd* v. *United States* (1886), 116 U. S. 616, an internal revenue law, held to violate the Fourth and Fifth Amendments, as to which see especially *New York World*, March 31, 1876; *Callan* v. *Wilson* (1888), 127 U. S. 540, a District of Columbia statute held to deprive persons of rights to trial by jury. As to the striking feature of the cases, that the Court did not divide on political lines, since in all these cases a Republican Court set aside Republican legislation, see *Address of George F. Hoar*, before the *Virginia Bar Ass.*, *Virg. Law Reg.* (1899), IV, and *The Supreme Court of the United States*, by Charles Hume, *Amer. Law Rev.* (1899), X, 411.

[2] See *Relation of the Judiciary to the Constitution*, by William M. Meigs, *Amer. Law Rev.* (1885), XIX; *A Plea for the Constitution of the United States of America Wounded in the House of its Guardians* (1886), by George Bancroft; *Observations on Mr. George Bancroft's Plea for the Constitution* (1886), by Richard C. McMurtrie; *Judicial Power and Unconstitutional Legislation*, by Brinton Coxe, pub. posthumously in 1893; *The Legislature and the Courts*, by Charles B. Elliott, *Pol. Sci. Qu.* (1890), V.

CHAPTER THIRTY-SEVEN

CHIEF JUSTICES FULLER AND WHITE

1888–1918

On March 23, 1888, Chief Justice Waite died at the age of seventy-one and after fourteen years' service on the Court.[1] "While impartial criticism may not assign to him the extraordinary rank in the esteem of the profession attained by his predecessors," said John Randolph Tucker at the Bar Proceeding on his death, "yet it may with entire truth be affirmed that in the soundness of his judgment, in the diligence of his research, in the clearness of his statements of legal principles and in the tact and skill displayed in the conduct of the business of the Court, he was a worthy successor. . . . It must be confessed that the period of service covered by his term was more fraught with difficulties, more full of new responsibilities and demanded more labor, learning and ability than in any previous period." Waite's great contribution to American law and to American history was of course his expounding of the scope of the War Amendments; and of this phase of his career a most striking account was given by Samuel A. Shellabarger, at the Bar Proceedings. He stated that just before the vote on the confirmation of Waite, Senator Sumner had asked him about Waite's character, saying: "I hesitate. I fear we stand at an epoch in the country's life, in the midst of revolution in its constitutional progress, at a nascent stage in the development of some of its institutions;

[1] See 126 U. S. App. proceedings of the Bar, March 26, 1888.

and I long for a Chief Justice like John Marshall, who shall pilot the country through the rocks and rapids in which we are." "I asked Mr. Sumner," said Shellabarger, "to point the President to a few John Marshalls standing 'in waiting', and I would guarantee the immediate nomination of at least one of them to the Chief Justiceship. Mr. Sumner said he would require some time to 'look around.' . . . As neither the time nor the spirit in which the new Amendments were gendered nor the text of these Amendments was characterized by eminent conservatism, therefore to many of us who engaged in framing these Amendments, the nomination of Waite 'gave pause.' When, therefore, Waite's great opinions construing these Amendments came, one in *Minor's Case* in 1874, holding that the Fourteenth Amendment does not add to the privileges and immunities of American citizens but simply adds guarantees for the protection of privileges theretofore existing, and especially when the great opinion appeared in 1876 in *Cruikshank's Case*, also holding that the Fourteenth Amendment adds nothing to the rights of one citizen against another, and . . . that these framers did not design to enable Congress to legislate affirmatively and directly for the protection of civil rights, but only to use corrective and restraining legislation as against the States, ... many of the framers of these Amendments received information regarding their intentions, which was new, and was not calculated to allay the apprehensions with which they saw Chief Justice Waite go upon the Bench. Still I am bound to say now, when the lapse of years has matured men's views and cooled their feelings regarding the results of the late war, and succeeding decisions have explained and supplemented these early decisions and have guarded against what was believed to be their erroneous tend-

encies, that I am inclined to think the judgment of history will be, that he has been, in the main, steadily right regarding these Amendments, especially in view of the restraining effect of the later decisions. I am inclined to think that the position in which is now left the power of the National Government in providing for the defence of the civil and political rights of the people, as members of the Nation, especially as that position is defined in such cases as *Ex parte Virginia*, *Ex parte Siebold*, *Strauder* v. *West Virginia*, and other later and kindred decisions, is safe and is conservative of our institutions; and that the great Court of which Chief Justice Waite has been so long the head will be entitled to, and will receive, the gratitude and veneration of the people of this Republic, in the generations to come, for having guided the Republic safely through many perils and for having fixed its institutions upon high, just and stable foundations."

As Waite's successor, President Cleveland, after considering Judge Miller, John G. Carlisle of Kentucky and many others, finally decided upon the appointment on May 2, 1888, of Melville Weston Fuller of Illinois. Fuller, who was fifty-five years of age and who had had no previous judicial experience, was confirmed by the Senate on July 20, 1888, by a vote of forty-one to twenty. Fuller's Chief Justiceship lasted twenty-two years, his death occurring on July 4, 1910, in his seventy-seventh year. His successor was Edward Douglass White of Louisiana, who had been an Associate Judge on the Court since 1894, and who served as Chief Justice until his death on May 19, 1921.

The period covered by the Chief Justiceships of Fuller and White is too recent and too clearly within the view of living men to warrant detailed description, nor can an adequate account be written until the lapse

of time shall afford a true historical perspective. No attempt, therefore, is made here to present more than a sketch in broad outlines of the general course of the Court's status and decisions, in the thirty years from 1888 to 1918, with especial reference to their connection with the history of the country.[1] These years were a period of unprecedented National growth. They presented a vast variety of legal questions arising out of the new status of the United States as a world power and in control of territorial possessions, as well as out of the multitudinous attempts by State Legislatures and by Congress to solve by legislation the complex social and economic problems of modern times.

The cases involving constitutional questions presented to the Court fall in general into three broad classes: first, those involving the debatable ground between the sphere allotted to the National Government by the Constitution and that reserved to the States; second, those involving the respective rights of individuals and the States in their relations to each other; third, those involving the powers of the National Government under the Constitution over matters relating to which either the States have no authority or have authority only until Congress shall have decided to legislate.[2] With respect to the first and second classes, the bulk of the cases have arisen under the Commerce Clause and the Fourteenth Amendment.

In interpreting the Fourteenth Amendment, while the Court has shown a consistent and progressive tendency to uphold the legislation of the States, it has developed no new principle which was not already

[1] The extent to which the new legal problems and decisions engaged public attention has been indicated in this chapter by copious citation of articles in leading law journals, all of which (with the exception of three) came into existence during the period from 1888 to 1918.

[2] See *Judicial Constitutional Amendment*, by Frederic R. Coudert, *Yale Law Journ.* (1904), XIII.

established or foreshadowed before the death of Waite. Its work has been largely in applying settled principles to new conditions and to new forms of legislation.

With respect to the Commerce Clause, on the other hand, there has been an immense development of the law, and an expansion of National power through affirmative action of Congress in new directions which had not been dreamed of prior to Waite's death. It is for this new tendency and for the increase of National functions under other clauses of the Constitution, especially in relation to the control of the mails, the taxing power, and the acquirement and government of new territorial possessions that the thirty years since 1888 have been a notable era in the history of American law. As early as 1885, Judge Thomas M. Cooley wrote: "Everything gravitates to Washington, the highest interests and the most absorbing ambitions look to the National Capital for gratification; and it is no longer the State, but the Nation that in men's minds and imagination is an ever-present sovereignty." In 1887, Judge Miller said: "While the pendulum of public opinion has swung with much force away from the extreme point of State-Rights doctrine, there may be danger of its reaching an extreme point on the other side." "The ceaseless accumulation of power" in the National Government became the theme of law writers throughout the years from 1890 to 1910. "The tendency in the country towards a centralization of power is increasing; the field of the National Government is constantly widening; a Unity is growing out of a Union, and the primary source of all this nationalizing power is the Commerce Clause," wrote Judge Walter E. Noyes in 1907; and three years later, James M. Beck wrote: "The insistence upon the reserved rights of the States has become little more than a political

platitude. There is little, if any, real popular sentiment of sufficient strength to protect the States against the encroachment of the Federal Government. . . . Men have been trained by imperative economic influences to look to the Central Government as the real political government, and to the States as little more than subordinate provinces, useful for purposes of local police regulation and nothing more. This tendency seems to be in the very nature of events. It is the work of no especial political party or of any political leader. . . . The American people think Nationally and not locally, as they once thought locally and rarely Nationally." [1]

The first great case sustaining the National power, decided after the accession of Chief Justice Fuller, was the *Chinese Exclusion Case, Chae Chan Ping* v. *United States*, 130 U. S. 581, in 1889, in which the Act of October 1, 1888, prohibiting entry of Chinese laborers and in violation of the Treaty with China was upheld as within the power of Congress.[2] This case was

[1] *History of Michigan* (1885), by Thomas M. Cooley, 271; *A New Nation*, by Hollis R. Bailey, *Harv. Law Rev.* (1895), IX; James Bryce in his *American Commonwealth* (1888), I, wrote: "It is clear that the development of the Constitution as between the Nation and the States has not yet stopped and present appearances suggest that the centralizing tendency will continue to prevail." See also *Recent Centralizing Tendencies in the Supreme Court*, by Frederic P. Powers, *Pol. Sci. Qu.* (1890), V; *The Commerce Clause and the State*, by A. H. Wintersteen, *Amer. Law Reg.* (1889), XXXVII; *Politics and the United States Supreme Court*, by Walter D. Coles, *Amer. Law Rev.* (1893), XXVII; *The Power to Regulate Interstate Commerce and the Police Powers of the State*, by Herbert B. Shoemaker, *ibid.* (1895), XXIX; *Judicial Centralization*, by L. H. Pool, *Yale Law Journ.* (1902), XI; *Development of the Commerce Clause*, by Walter C. Noyes, *ibid.* (1907), XVI; *Nullification by Indirection*, by James M. Beck, *Harv. Law Rev.* (1910), XXIII. Simeon E. Baldwin in his address to the American Political Science Association in 1912 on *The Progressive Unfolding of the Power of the United States*, asked: "How far will this process of expansion go?" *Amer. Pol. Sci. Rev.* (1912), VI; *Expansion of Federal Power*, by Judge Francis L. Smith, *Virginia Law Reg.* (1911), XVII.

[2] *The Chinese Exclusion Cases*, by M. J. Farrelly, *Amer. Law Rev.* (1894), XXVIII; see for practical application of the doctrine, *United States* v. *Sing Tuck* (1904), 194 U. S. 161; *United States* v. *Ji Toy* (1905), 198 U. S. 253; *Chin Low* v. *United States*, 208 U. S. 8; *Administrative Action in Immigration Proceedings*, by Thomas R. Powell, *Harv. Law Rev.* (1908), XXII; *The Control of Immigration as an Admin-*

followed by the extreme decision made in *Fong Yue Ting* v. *United States*, 149 U. S. 698, three years later, in 1893, in which the power of a sovereign nation to forbid the entrance of foreigners or to expel or deport them was upheld as absolute and unqualified, and the Act of May 5, 1892, was held valid.[1] This opinion by Judge Gray seemed to justify the old Alien Law of 1798, and there was a strong dissent by the Democratic Judges Fuller and Field, and by Judge Brewer, who stated that it was "a blow against constitutional liberty", and that it contained within it "the germs of an assertion of unlimited and arbitrary power, in general incompatible with the immutable principles of justice, inconsistent with the nature of our government."

In 1890, in *Geofroy* v. *Riggs*, 133 U. S. 258, the Court broadened the field of National action by holding that it was within the scope of the treaty power to regulate alien inheritance of lands in the States.[2] The power of the President to direct the United States marshals to afford protection to the lives of the Federal Judges was upheld, in 1890, in *Cunningham* v. *Neagle*, 135 U. S. 1; and a marshal who shot a man in defense of Judge Field, though given no statutory authority, was held to be acting "in pursuance of a law of the United

istrative Problem, by Paul S. Pierce, *Amer. Pol. Sci. Rev.* (1909), III; *Administrative Decision in Connection with Immigration*, by Louis F. Post, *ibid.* (1916), X.

That Congress, however, cannot regulate the citizenship of a Chinaman was held in *United States* v. *Wong Kim Ark* (1898), 169 U. S. 649.

[1] In 1912, in *Zakonaite* v. *Wolf* (1898), 226 U. S. 272, the deportation of alien prostitutes under the Act of Feb. 20, 1907, was upheld; and see *Hoke* v. *United States* (1913), 227 U. S. 308; and see *Keller* v. *United States* (1909), 213 U. S. 138, as to the limit of Congressional power over aliens in this country.

[2] These decisions culminated in *Missouri* v. *Holland* (1920), 252 U. S. 416, upholding the Migratory Bird Treaty with Canada; see also *National Supremacy, Treaty Power* v. *State Power* (1913), by Edward S. Corwin; *Federal Treaties and State Laws*, by C. N. Gregory, *Michigan Law Rev.* (1907), VI; *The Treaty Power and Its Relation to State Courts*, by William C. Coleman, *Amer. Law Rev.* (1909), XLIII; *The Extent of the Treaty-Making Power*, by William E. Mikell, *Amer. Law Reg.* (1909), LVII.

States." This was the broadest interpretation yet given to implied powers of the National Government under the Constitution.[1] The plenary power of Congress over the Territories was upheld in broad terms in *Corporation of Latter Day Saints* v. *United States*, 136 U. S. 1, sustaining the statute annulling the charter of the Mormon Church, the Court reaffirming a decision, rendered five years before, holding that the "people of the United States as sovereign owners of the National Territories have supreme power over them and their inhabitants." [2] The announcement of the Original Package doctrine, in *Leisy* v. *Hardin*, 135 U. S. 100, as applicable to articles in interstate commerce was regarded as the "most crushing blow against the rights of the States which has ever been dealt by that tribunal." [3] At the same time it was made clear in *Chicago, Milwaukee & St. Paul R. R.* v. *Minnesota*, 134 U. S. 418, that the right of the State to regulate corporate rates, established by the *Granger Cases* in 1878, was not unlimited, but was confined to a right to fix reasonable and nonconfiscatory rates and reviewable by the Court under the Due Process Clause.[4]

In 1892, the National power received further expan-

[1] *Power of the General Government to Protect its Officers and to Control Anarchy*, by Joseph B. Thompson, *Amer. Law Rev.* (1901), XXXV.

[2] Polygamy was prohibited by Congress in 1867 but the statute remained a dead letter until the Edmunds Act in 1882, and the Tucker Act in 1887. Utah was admitted as a State in 1895, under an Act forbidding polygamous and plural marriages. For other cases as to the Mormon Church and polygamy, see *Reynolds* v. *United States* (1879), 98 U. S. 145; *Miles* v. *United States* (1881), 103 U. S. 304; *Clawson* v. *United States* (1885), 114 U. S. 477; *Murphy* v. *Ramsay* (1885), 114 U. S. 15; *Cannon* v. *United States* (1885), 116 U. S. 55; *Snow* v. *United States* (1886), 118 U. S. 346; *United States* v. *The Late Corporation of the Church of Jesus Christ of Latter Day Saints* (1893), 150 U. S. 145. See also *Independent*, Jan. 16, 1879, May 6, 1886, as to argument of G. T. Curtis for overruling of *Reynolds* v. *United States*; *Nation*, April 23, 1885.

[3] *Amer. Law Rev.* (1890), XXIV, 474, 490.

[4] See also *Budd* v. *New York*, 143 U. S. 517, in 1892; *Legal Theories of Price Regulation*, by Arthur T. Hadley, *Yale Law Journ.* (1892), I; *Can Prices be Regulated by Law?* by William D. Lewis, *Amer. Law Reg.*(1893), XXXII; *A New Canon on Constitutional Construction*, by Richard C. McMurtrie, *ibid.*

sion through the decision in *Ex parte Rapier*, 143 U. S. 110, upholding the power of Congress to exclude lotteries from the use of the mails; and the extent of the scope of this clause of the Constitution relative to postroads was illustrated, twelve years later, in 1904, by a decision upholding the fraud-order legislation, *Public Clearing House* v. *Coyne*, 194 U. S. 497.[1] In 1892 also, the power of the United States to sue a State in order to fix boundaries — a power which had been vigorously denied in the debates in Congress succeeding the Mexican War, — was upheld in *United States* v. *Texas*, 143 U. S. 621.

In 1893, the Court restated and reiterated the doctrine which Judge Story had originated, in 1842, in *Swift* v. *Tyson*, that upon questions of general commercial law the Court would ascertain the law for itself and would not be bound by State decisions. Year by year, and especially since *Burgess* v. *Seligman*, 107 U. S. 20, in 1883, the Court had developed this formulation of a body of National law, distinct from State law and applicable in the National Courts, until it had become a distinct factor in the increase of National power. Now, in *Baltimore & Ohio R. R.* v. *Baugh*, 149 U. S. 368, it applied its doctrine in a case involving the question whether certain railroad employees fell within the fellow-servant rule under the general law, rather than within the rule as applied in the State. Judge Field wrote a vigorous dissent, terming the doctrine "an invasion of the authority of the State, and to that extent a denial of its independence." Eight years later, the doctrine received a notable application and extension when Judge Brewer announced, in *Western Union Tel. Co.* v. *Call Publishing Co.*, 181 U. S. 92,

[1] See *The Expansion of Federal Control Through the Regulation of the Mails*, by Lindsay Rogers, *Harv. Law Rev.* (1913), XXVII; *The Power of the States to Interfere with the Mails*, by Lindsay Rogers, *Virg. Law Rev.* (1916), III.

that "the principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by Congressional enactment"; and in *Kansas* v. *Colorado*, 206 U. S. 46, in 1907, the Court said that "the Court is practically building up what may be not improperly called Interstate Common Law." [1]

In 1894, the growing power of the National Government over the railroads was shown when a railroad rate order of a Texas State Commission was held invalid in *Reagan* v. *Farmer Loan & Trust Co.*, 154 U. S. 362.[2]

The year 1895 was notable for the decision of three great cases in which the public took the liveliest interest. In the first, decided January 21, the Court passed for the first time on the application of the Sherman Anti-Trust Act to commercial corporations, and in *United States* v. *E. C. Knight Co.*, 156 U. S. 1, — the *Sugar Trust Case*, — held that, on the facts presented, the corporations involved in the combination refining sugar were not engaged in interstate commerce. The result was a disappointment to those who relied on the Act as a destroyer of the trusts. The second case involved the constitutionality of the Income Tax imposed in the Wilson-Gorman Tariff Act in President Cleveland's Administration, *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S. 429, 158 U. S. 601; and the unfortunate circumstances attending this case aroused further bitter attacks upon the Court. At its first decision, April 8, 1895, the Court held a tax on real

[1] *The Common Law Jurisdiction of the United States Courts*, by Alton B. Parker, *Yale Law Journ.* (1907), XVII; *Relation of Judicial Decisions to Law*, by Alexander Lincoln, *Harv. Law Rev.* (1907), XXI; *The Common Law of the Federal Courts*, by Edward C. Eliot, *Amer. Law Rev.* (1902), XXXVI; *Decisions of the Federal Courts on Questions of State Law*, by William M. Meigs, *Amer. Law Rev.* (1911), XLV; see especially for criticisms of the extent of the doctrine, Holmes, J., dissenting in *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, in 1910.

[2] *The Right of the Public to Regulate Charges*, by Walter Clark, *Amer. Law Rev.* (1897), XXXI.

estate income unconstitutional, unless levied in the manner required for a direct tax; as to other income, the Court was evenly divided, Judge Jackson being absent owing to illness. A reargument being ordered, a second decision was made May 20, 1895, in which Judge Jackson (three months before his death) participated; but owing to the fact that Judge Shiras changed his mind after the first decision, the Court, by a vote of five to four, held the whole tax invalid.[1] Violent criticism followed this event (the result of which was the adoption of the Sixteenth Amendment, in 1913).[2]

Equally violent assaults upon the Court followed from a decision rendered, seven days later, in the third great case, *In re Debs*, 158 U. S. 564. For the past five years, legal questions growing out of labor strikes had been presented more and more frequently to the inferior Federal Courts through applications for injunctions, chiefly by owners and Federal receivers of railroads. In 1893, the Supreme Court had for the first time been called upon to deal with the subject in *Pettibone* v. *United States*, 148 U. S. 197, arising on an indictment for conspiracy to impede the administration of justice, by obstruction of processes issued by an inferior Federal Court in the serious strike and riots which took place, in 1899, in the Cœur d'Alenes in Idaho. The *Debs Case* grew out of the great Pullman strike and

[1] See *Amer. Law Rev.* (1895), XXIX, 524, 489, 742: "The Sugar Trust decision and the Income Tax decision counterbalance all the good it has done in seventy years . . . a wound inflicted on the rights of the American people;" *Pollock* v. *Farmers' Loan & Trust Co.*, by Francis R. Jones, *Harv. Law Rev.* (1895), IX; *The Constitutionality of the Income Tax*, by William D. Lewis, *Amer. Law Reg.* (1895), XXXIV; *What is Now an Indirect Tax*, by Louis D. Richardson, *ibid.*

[2] *Recent Constitutional Amendments*, by Gordon E. Sherman, *Yale Law Journ.* (1913), XXIII; *The Income Tax and the Constitution*, by Edward B. Whitney. *Harv. Law Rev.* (1907), XX; *Direct Taxes under the Constitution*, by Charles T. Bullock, *Pol. Sci. Qu.* (1900), XV; *The Income Tax Amendment*, by E. R. A. Seligman, *ibid.* (1910), XXV; *The Income Tax Amendment*, by Dwight W. Morrow, *Columbia Law Rev.* (1910), X.

riots of 1894, and its decision, on May 25, 1895, is to be regarded as one of the datum posts in American legal history. The Court, in a notable opinion by Judge Brewer, upheld an injunction issued by the lower Court, restraining the defendant from obstructing trains engaged in interstate commerce or in carrying the mails. "The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails," said Brewer. "If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws." While holding that the Government had a property right in the mails sufficient to warrant its suing in equity, he stated that the Court did not care to place its decision upon this ground alone. "Every government, entrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own Courts for any proper assistance in the exercise of the one and the discharge of the other. . . . Whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes a duty to all the citizens of securing to them their common rights, then the mere fact that the Government has no pecuniary interest in the controversy is not sufficient to exclude it from the Courts or to prevent it from taking measures therein to fully discharge those constitutional duties."

This decision, sustaining President Cleveland's energetic action in employing both the military and civil forces of the Government to end the strike, caused a great sensation, and was widely indorsed by conservative and patriotic men, as a strong support to the

stability of the Nation. Such an application of National power to a labor situation, however, was a long step towards centralization of authority; and as a legal writer said, while "all must applaud the promptness and vigor with which the Federal power acted, saving the country perhaps from a reign of anarchy and bloodshed. . . slowly but inevitably one after another of these State police powers is being brought within the limits of Federal jurisdiction."[1] The decision gave great offense to certain labor elements in the community; and as it was rendered only a week after the decision in the *Income Tax Case*, it was criticized as an illustration of the prejudice of the Court in favor of capital.

The public discussion and hostility which grew out of these three decisions in 1895, each of which was asserted to have been in favor of "the propertied class", was signalized by the insertion of a plank in the platform adopted at the National Convention of the Democratic Party in Chicago in 1896, which, in that campaign of somewhat hysterical political passion, was termed an anarchical attack on the Judiciary. In reality, the plank was an extremely mild expression of views, when compared with many former criticisms which had been made in conservative newspapers and law journals.[2] The general situation, however, and

[1] *Federal Power to Regulate Interstate Commerce and the Police Powers of the State*, by Herbert B. Shoemaker, *Amer. Law Rev.* (1895), XXIX; *Use of the Army in Aid of the Civil Power*, by C. M. Lieber, *ibid.* (1898), XXXII; see also note as to President Cleveland's authority to use the army, *ibid.* (1896), XXVIII.

[2] See *Amer. Law Rev.* (1896), XXX, 579, as to the Democratic platform. The controverted plank was as follows: "We declare that it is the duty of Congress to use all the constitutional power which remains after that decision, or which may come from its reversal by the Court as it may hereafter be constituted, so that the burden of taxation may be equally and impartially laid, to the end that wealth may bear its due proportion of the expenses of the government. . . . We denounce arbitrary interference by Federal authorities in local affairs as a violation of the Constitution of the United States and as a crime against free institutions, and we especially object to government by injunction as a new and highly dangerous form

especially the Income Tax decision, produced a reawakening of the type of assault on the Court which had appeared successively in 1821, 1833, 1857, 1868, 1885 — namely the demand that the Court should be shorn of its alleged "usurped" power to pass upon the validity of Acts of Congress. All the fallacious arguments which had been used in previous eras were reproduced, and, as formerly, reiterated without any attempt to ascertain the historical facts as to the "usurpation", and as to the contemporary view of *Marbury* v. *Madison* in this respect.[1] Most violent and voluble of all the Court's critics was Governor Sylvester Pennoyer of Oregon, who wrote: "We have during this time been living under a government not based upon the Federal Constitution, but under one created by the plausible sophistries of John Marshall. The Supreme Court has not contented itself with its undisputed judicial prerogative of interpreting the laws of Congress which may be ambiguous, but it has usurped the legislative prerogative of declaring what the laws shall not be. Our constitutional government has been supplanted by a judicial oligarchy. The time has now arrived when the government should be restored to its constitutional basis. The duty is plain and the road is clear. If Congress at the next session would impeach the nullifying Judges for the usurpa-

of oppression by which Federal Judges, in contempt of the law of the States and rights of citizens, become at once Legislators, Judges and executioners; and we approve the bill, passed at the last session of the United States Senate and now pending in the House, relative to contempts in Federal Courts, providing for trials by jury in certain cases of contempt."

[1] *The Income Tax Decision and the Power of the Supreme Court to Nullify Acts of Congress*, by Sylvester Pennoyer, *Amer. Law Rev.* (July, 1895), XXIX; *The Case of Marbury* v. *Madison*, by Sylvester Pennoyer, *ibid.* (1896), XXX; *Due Process of Law*, by T. W. Brown, *ibid.* (1898), XXXII; see in defense of the Court, *Origin of the Supreme Judicial Power*, by Robert L. Fowler, *ibid.* (1895), XXIX; *The Supreme Court as Expounder of the Constitution*, by T. C. Rosenberger, *ibid.* (1896), XXX; *The Judiciary, its Growing Power and Influence*, by Boyd Winchester, *ibid.* (1898), XXXII; *The Jurisdiction to Declare Void Acts of Legislation*, by Richard C. McMurtrie, *Amer. Law Reg.* (1893), XLI.

tion of legislative power, remove them from office, and instruct the President to enforce the collection of the income tax, the Supreme Court of the United States would never hereafter presume to trench upon the exclusive powers of Congress; and thus the Government, as created by our fathers, would be restored, with all its faultless outlines and harmonious proportions." Another critic, a prominent Georgia lawyer, wrote on the "Aggressions of the Federal Courts", including among them, the issue of injunctions in criminal matters, the decision of the *Neagle Case*, the interference with municipal governments by Federal injunctions and receiverships, the annulment of statutes, the permission of corporations to sue in Federal Courts, the control of State railroad rate legislation, labor injunctions and the *Debs Case*, the *Sugar Trust Case*, the "jailing of Sovereign States", and Federal Court management of railroads.[1]

Coincident with these attacks on the Supreme Court, there had arisen severe criticisms of the extension of the power of the National Judiciary through its increasingly wide exercise of equity jurisdiction and extensive employment of injunctions. "Government by injunction" had become a term of judicial opprobrium constantly echoed by the laboring class.[2] The abuse of

[1] *Aggressions of the Federal Courts*, by John W. Akin, *Amer. Law Rev.* (1898), XXXII. Camm Patteson in *Judicial Usurpation of Power, Virginia Law Reg.* (1905), X, said: "The greatest danger which threatens the American Republic, is the judicial usurpation of power. . . . The fatal extension of the power of the process of injunction was the greatest step of all. It tore down and trampled under foot the chief protection of our liberty. . . . The so-called protection of the United States mail was used as a mere pretext to cover the unauthorized usurpation of power."

[2] *Protest against Administering Criminal Law by Injunction — the Debs Case*, by William D. Lewis, *Amer. Law Reg.* (1894), XLII; see especially symposium on labor injunctions in *Chicago Times Herald*, Sept. 19, 1897; *Government by Injunction*, by Charles N. Gregory, *Harv. Law Rev.* (1898), XI; *Strikes and Trusts, Amer. Law Rev.* (1893), XXVII; *The Modern Use of Injunctions*, by Frederic J. Stimson, *ibid.* (1895), X; *Injunction in the Federal Courts*, by William A. Woods, *Yale Law Journ.* (1896), VI; *Government by Injunction*, by W. G. Peterkin, *Vir-*

Federal railroad receiverships was a source of complaint in the business world. State Legislatures, lawyers and Judges questioned the freedom of assumption of jurisdiction by the United States Circuit Courts — "the innate viciousness of a receivership régime." [1]

Discussions had also arisen, in connection with the situation, as to the advisability of some statutory change in the doctrine evolved by Chief Justice Taney in the *Letson Case*, in 1844, under which corporations were held citizens of the State of their charter for purpose of suit in the Circuit Courts on grounds of diverse citizenship. This doctrine had never met full acceptance by Judges of the Court, and with the enormous development of corporate activities, and of "tramp" corporations, it had become more and more unpopular, since it resulted in the removal of almost all important litigation against corporations into the Circuit Courts and out of the State jurisdictions. A bill had been introduced in Congress in 1894 to restore the law as to the right of corporations to sue in such Courts to its status at the time of Marshall's decision in the *Deveaux Case*, in 1804. Congress failed to act, though strong arguments were made in the law journals of the country against retention of this privileged position for corporations.[2]

ginia Law Reg. (1898), III; *Strikes and Courts of Equity*, by William D. Lewis, *Amer. Law Reg.* (1898), XLVI; *The Court's View of Injunction in Labor Disputes*, by G. G. Groat, *Harv. Law Rev.* (1908), XXIII; *Injunctions Against Strikes, and Boycotts*, by James W. Bryan, *Amer. Law Rev.* (1906), XL.

[1] *Memorial of the Legislature of South Carolina on Receivers of Railroad Corporations and the Equity Jurisdiction of United States Courts*, in *Amer. Law Rev.* (1894), XXVIII; *The Court Management of Railroads*, by Seymour D. Thompson, *ibid.* (1893), XXVII; *Criticisms of the Federal Judiciary*, by Judge William H. Taft, *ibid.* (1895), XXVIII; *Railroad Receiverships in the Federal Courts*, by Judge Henry C. Caldwell, *ibid.* (1896), XXX; *New Fashioned Receiverships*, by D. H. Chamberlain, *Harv. Law Rev.* (1896), X; *Mandatory Injunction*, by Judge Jacob Klein, *Harv. Law Rev.* (1898), XII; *Suits Against Receivers*, by W. A. Coutts, *Amer. Law Rev.* (1904), XXXVIII; (1905), XXXIX; *Jurisdiction of Federal Equity Courts*, by Benjamin F. Keller, *ibid.* (1913), XLVII.

[2] *Congress Should Abrogate Federal Jurisdiction Over Corporations*, by Alfred

In 1896, the Court announced the broadest definition of the right of Congress to legislate for the general welfare when it sustained the taking by eminent domain of the Gettysburg battlefield for a National cemetery, in *United States* v. *Gettysburg Electric Ry. Co.*, 160 U. S. 668: "Such a use," said the Democratic Judge, Peckham, "seems necessarily, not only a public use, but one so closely connected with the welfare of the Republic itself as to be within the powers granted to Congress by the Constitution for the purpose of protecting and preserving the whole country." This decision, taken in connection with the *Debs Case*, showed that the Court was practically prepared to support any action taken by the National Government and reasonably necessary for its self-preservation and welfare.

In this same year, a decision upholding the payment to claimants of the sugar bounty granted by the McKinley Act aroused severe criticism, since the Court, while expressly declining to rule on the validity of the bounty legislation, held the claim under the circumstances to be one which Congress had power to recognize and pay, *United States* v. *Realty Co.*, 163 U. S. 274. "The Nation, speaking broadly, owes a 'debt' to an individual, when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or

Russell, *Harv. Law Rev.* (1893), VII; *Federal Jurisdiction in Case of Corporations*, by Seymour D. Thompson, *Amer. Law Rev.* (1895), XXIX: Judge William H. Taft vigorously controverted the position taken in the foregoing articles, see *Criticisms of the Federal Judiciary, Amer. Law Rev.* (1895), XXIX; see also *Jurisdiction of Federal Courts in Actions in which Corporations are Parties*, by Judge Jacob Trieber, *ibid.* (1905), XXXIX; *A Legal Fiction with its Wings Clipped*, by Simeon E. Baldwin, *ibid.* (1907), XLI; *Jurisdiction of Federal Courts over State Corporations*, by P. J. Altizer, *ibid.* (1909), XLIII; *The Supreme Court and Enforcement of State Laws by State Courts*, by Henry Schofield, *Illinois Law Rev.* (1908), III; *Should Federal Courts Ignore State Laws*, by Henry E. Mills, *Amer. Law Rev.* (1900), XXXIV.

the honor of an individual, although the debt could obtain no recognition in a Court of law." This decision was attacked as "a departure from the ancient tenets of law"; as "partisan and class favoring"; "dangerous and revolutionary"; "if not hastily repudiated it may work an epoch like Dred Scott . . . the one decision denying the rights of man, the other violating the rights of the whole people." [1]

In 1897, the Court, to the shock of the business world, for the first time announced, in *United States* v. *Trans-Missouri Freight Ass.*, 166 U. S. 290, that railroad pools were illegal under the Sherman Act directed against combinations in restraint of interstate trade; [2] eleven years later, when the case of *Loewe* v. *Lawlor*, 208 U. S. 274, was decided in 1908, the labor-unions were equally shocked to find that a labor boycott obstructing the free flow of commerce between the States came also within the prohibition of the Sherman Act.[3]

In 1899, there began the long series of cases growing out of the Spanish War, which occupied much of the attention of the Court during the next six years. The first to be decided were a group of prize cases in which various important points of international law were settled.[4] These were followed, in May, 1901, by the

[1] *Constitutionality of a Bounty on Sugar*, by William D. Lewis, *Amer. Law Reg.* (1892), XXXI; *Sugar Bounty Cases*, by Joseph Wheless, *Amer. Law Rev.* (1896), XXX; *Sugar Bounty Cases*, by H. Campbell Black, *ibid.* (1895), XXIX; *Sugar Bounties*, by Charles F. Chamberlayne, *Harv. Law Rev.* (1892), V; and see *Field* v. *Clark* (1892), 143 U. S. 649; *Ship Subsidies and Bounties*, by H. F. Robinson, *Columbia Law Rev.* (1902), II.

[2] *Case of the Trans-Missouri Freight Association*, by G. S. Patterson, *Amer. Law Reg.* (1897), XLV.

[3] *The Danbury Hatters Case, Its Possible Effect on Labor Unions*, by Theodor Megaarden, *Amer. Law Rev.* (1915), XLIX.

[4] *The Pedro* (1899), 175 U. S. 354; *The Buena Ventura* (1899), 175 U. S. 384; *The Paquete Habana* (1900), 175 U. S. 677, 189 U. S. 453; *The Adula* (1900), 176 U. S. 361; *The Panama* (1900), 176 U. S. 535; *The Benito Estenger* (1900), 176 U. S. 568; see *The Law of Blockade*, by Charles N. Gregory, *Yale Law Journ.* (1903), XII; *Recent Developments and Tendency of the Law of Prize*, by Henry M. Holt, *ibid.*; *The Doctrine of Continuous Voyage*, by Charles B. Elliott, *ibid.* (1903),

notable cases, lasting until 1905, in which the status and constitutional rights of Cuba, of the newly acquired territory of Porto Rico and the Philippines and of Hawaii were at last definitely settled.[1] "This judicial drama of truly Olympian proportions" constituted by far the most important fact in the Court's history during the period since Waite's death, and has been interestingly summarized as follows.[2] "When the Spanish War had resulted in the cession to the United States of Porto Rico and the Philippines, the question of their constitutional status at once arose. It entered immediately into the political arena, and in the Presidential campaign of 1900 divided, with the cry of 'Imperialism', political parties and their adherents. The discord which it created in the judicial forum was no less pronounced. The *De Lima*, *Dooley* and *Bidwell Cases* presented in concrete form the questions whether the Island of Porto Rico, after its cession by Spain,

XIII; *Right of a Belligerent to Destroy a Captured Prize*, by Francis T. Swayze, *Harv. Law Rev.* (1904), XVIII; *Doctrine of Continuous Voyage*, by Charles N. Gregory, *ibid.* (1910), XXIV; *Questions of International Law Involved in the Spanish War*, by W. W. Goodrich, *Amer. Law Rev.* (1898), XXXII; *Rights of Belligerents and Neutrals from the American Point of View*, by Alexander P. Morse, *Amer. Law Reg.* (1898), XLVI.

[1] *Neeley* v. *Henkel* (1901), 180 U. S. 109; *De Lima* v. *Bidwell* (1901), 182 U. S. 1; *Downes* v. *Bidwell* (1901), 182 U. S. 244; *Dooley* v. *United States* (1901), 182 U. S. 222; *Dooley* v. *United States* (1901), 183 U. S. 151; *The Diamond Rings* (1901), 183 U. S. 176; *Hawaii* v. *Mankichi* (1903), 190 U. S. 197; *Kepner* v. *United States* (1904), 195 U. S. 100; *Dorr* v. *United States* (1904), 195 U. S. 138; *Trono* v. *United States* (1905), 199 U. S. 521, and *Rasmussen* v. *United States* (1905), 197 U. S. 516; *Porto Rico* v. *Tapia* (1918), 245 U. S. 639. The tremendous interest taken in the decision by the Court as to the status of the new territories is illustrated by the enormous number of articles in the law journals, 1899–1905, citation of which is not practicable; but see *The Causes and Results of our War with Spain from a Legal Standpoint*, by Judge Elmer B. Adams, *Yale Law Journ.* (Dec., 1898), VIII; *The Final Phase of the Insular Tariff Controversies*, by Henry M. Hoyt, *ibid.* (1905), XIV; *The Legal Status of the Philippines*, by Lebbeus R. Wilfrey, *ibid.*; *The Hawaiian Case*, by Emlin McClain, *Harv. Law Rev.* (1904), VII; *The Decisions of the Supreme Court in the Insular Cases*, by John W. Burgess, *Pol. Sci. Qu.* (1901), XVI; *The Insular Cases*, by Carman F. Randolph, *Columbia Law Rev.* (1901), I; *The Insular Decisions of 1901*, by Edward B. Whitney, *ibid.* (1902), II.

[2] See *Edward Douglass White*, by John W. Davis, *Amer. Bar Ass. Journ.* (1921), VII.

THE SUPREME COURT IN 1899

Standing: Peckham, Shiras, White, McKenna. *Seated:* Brewer, Harlan, Chief Justice Fuller, Gray, Brown.

ceased to be 'foreign country', within the meaning of the existing tariff laws of the United States; and secondly, to what extent, if at all, the island fell within the revenue clauses of the Constitution, and the requirement that duties, imposts and excises should be uniform throughout the United States. The division of opinion on the Court was sharp and pronounced. The first view was that of Mr. Justice Brown, alone. He plowed a lonely furrow and held that, while Porto Rico had ceased to be 'foreign country' within the meaning of the Dingley Act, yet, as to future legislation (the Foraker Act of April 12, 1900), the uniform clause did not apply; that Porto Rico became by the cession 'territory appurtenant' to the United States, but not a part of it; and that even over continental and contiguous territory, the Constitution went only as the result of express Congressional action. As against this, Chief Justice Fuller and Justices Harlan, Brewer, and Peckham maintained that Porto Rico, at least upon the ratification of the treaty, became a part of the United States, and as such could be dealt with only in the manner which the Constitution provides; or, in the language of the hour, the 'Constitution follows the flag.' Between these two extremes were to be found Justices White, McKenna, Shiras and Gray, who maintained that the government of the United States has power to acquire and hold territory without immediately incorporating it into the United States, and that Congress can determine when acquired territory has reached that state where it is proper that it should enter into and form a part of the American family; and that Porto Rico, though not a foreign country in an international sense, since it was subject to and under the sovereignty of the United States after the treaty of cession, continued to be foreign to the United States in

a domestic sense because it had not been incorporated into the United States, but was merely appurtenant thereto as a possession. These views were defended with a wealth of reasoning and a warmth of argument worthy of the greatness of the issue, but with the curious result that the judgment in the *De Lima* and *Dooley Cases* was concurred in, though for wholly different reasons, by Justices Brown, Harlan, Brewer, Peckham and the Chief Justice; while that in the *Downes Case* was supported by Justices Brown, White, McKenna, Shiras and Gray. . . . Judge White's 'idea of incorporation' was destined to prevail. . . . In *Hawaii* v. *Mankichi*, in 1903, the constitutional guaranties of trial by jury were held inapplicable to the Hawaiian Islands, Justice White taking occasion for himself and Justice McKenna to reiterate their views in *Downer* v. *Bidwell*, and Justices Fuller, Brewer, Harlan and Peckham filing the customary dissent. A year later came the case of *Dorr* v. *The United States* in which the opinion written by Justice Day, who meanwhile had come upon the Bench, held that the right of trial by jury was not extended by the Federal Constitution, without legislation and of its own force, to the Philippine Islands, ceded to the United States by Spain, but not incorporated into the United States by Congressional action. . . . Finally, in *Rasmussen* v. *United States*, the question arose with reference to Alaska, and at last Justice White, writing for a clear majority of the Court, was able to repeat with authority the views he had all along maintained. . . . Justice Harlan, although concurring in the instant result, nailed his colors to the mast on the main question and went down fighting to the last. Years later, in speaking of the controversy, Chief Justice White evidenced the depth of his conviction by the remark, 'Why, sir, if we had not decided

as we did, this country would have been less than a Nation!'" The capsheaf of the doctrine of incorporation was applied in *Porto Rico* v. *Tapia*, in 1918, when the Court held that rights guaranteed by the Constitution might be withheld by Congress from an unincorporated territory even though Congress had granted United States citizenship to the inhabitants of such territory.

Growing out of the Spanish War, there were also a series of important cases, decided from 1899 to 1901, in which the Court sustained (in all but one) the power of the United States to levy taxes of various kinds in the nature of an excise or stamp tax, including a tax on transmission of property by death.[1]

In 1903, the decision in the great *Lottery Case*, *Champion* v. *Ames*, 188 U. S. 321, gave an enormous impetus to the extension of National power over interstate commerce, and the decision in *Perry* v. *Haines*, 191 U. S. 17, by which the Federal Admiralty jurisdiction was for the first time held to extend to inland canals, greatly broadened the field of the National Courts.[2]

In 1904, the decision in *Northern Securities Co.* v. *United States*, 193 U. S. 197, deciding the Sherman Act to be applicable to the case of a holding company, for the first time showed that this law had teeth.[3] In

[1] See *Knowlton* v. *Moore*, 178 U. S. 41, in 1900; *Nicol* v. *Ames*, 173 U. S. 509, in 1899; in *Fairbank* v. *United States*, 181 U. S. 283, in 1901, a stamp tax on a foreign bill of lading was held unconstitutional.

[2] "It treated the profession and the country with a general surprise . . . jealousy and alarm." *Amer. Law Rev.* (1903), XXXVII, 911.

[3] *The Northern Securities Co.*, by Edward B. Whitney, *Yale Law Journ.* (1902), XI; *A Reply*, by D. H. Chamberlain, *ibid.* (1903), XIII; *Northern Securities Case*, by Christopher C. Langdell, *Harv. Law Rev.* (1903), XVI, XVII; see press comments on the *Northern Securities Case*, in *Amer. Law Rev.* (1904), XXVII. *Northern Securities Case*, by Carman F. Randolph, *Columbia Law Rev.* (1903), III; *Northern Securities Decision*, by George F. Canfield, *ibid.* (1904), IV; *The Supreme Court and the Sherman Anti-Trust Act*, by William F. Dana, *Harv. Law Rev.* (1903), XVI; *The Northern Securities Decision*, by Henry W. Biklé, *Amer. Law Reg.* (1904),

Buttfield v. *Stranahan*, 192 U. S. 470, the Court upheld a statute vesting wide regulative power in an Executive Department. By holding that Congress had legislated on the subject "as far as was reasonably practicable", and that it had the power "to leave to Executive officials the duty of bringing about the result pointed out by the statute," the Court vastly increased the extent of Executive authority. This tendency of Congress to vest the Executive with power to make regulations, as a substitute for specific legislative enactment, has of late years been the source of considerable adverse criticism.[1]

In 1905, State sovereignty was greatly impaired by a decision in *South Carolina* v. *United States*, 199 U. S. 437, that State agents selling liquor must pay a Federal license tax. "Under the assumed necessity of protecting the taxing power of the Government of the United States," said Judge White dissenting, "it establishes a doctrine which in its potentiality strips the States of their lawful authority. . . . The ancient landmarks are obliterated and the distinct powers be-

LII. In *Minnesota* v. *Northern Securities Co.*, 184 U. S. 540, in 1902, the Court had held that a State can have no power to sue one of its own citizens in an original suit in the United States Supreme Court. A decision as to the legality of the company was not made, therefore, until the Government suit was decided in 1904.

[1] But see *The Administrative Powers of the President*, by John A. Fairlie, *Michigan Law Rev.* (1903), II; *The Administrative Law of the United States*, by Frank J. Goodnow, *Pol. Sci. Qu.* (1904), XIX; *Conclusiveness of Administrative Determination in the Federal Government*, by Thomas R. Powell, *Amer. Pol. Sci. Rev.* (1907), I; *Administrative Exercise of Legislative and Judicial Power*, by Thomas R. Powell, *ibid.* (1912, 1913), XXVII, XXVIII; *Jurisdictional Limitations upon Commission Action*, by Bruce Wyman, *Harv. Law Rev.* (1914), XXVII; *Judicial Determination by Administrative Commissions*, by Charles W. Needham, *Amer. Pol. Sci. Rev.* (1916), X; *The Land Department as an Administrative Tribunal*, by Charles P. Pierce, *ibid.*; see also *Monongahela Bridge Co.* v. *United States* (1910), 216 U. S. 177; *Some Powers and Problems of the Federal Administrative*, by Jasper Y. Brinton, *U. of P. Law Rev.* (1913), LXI; *Administrative Legislation*, by John A. Fairlie, *Michigan Law Rev.* (1910), XVIII. *Judicial Review of Administrative Action by the Federal Supreme Court*, by G. E. F. Albertsworth, *ibid.* (1921), XXXV; *Judicial Review of Administrative Findings*, by Nathan Isaacs, *Yale Law Journ.* (1921), XXX; *Judicial Review of Commissioners*, by Lawrence Curtis, 2nd, *Harv. Law Rev.* (1921), XXXIV.

longing to both the National and State Governments are reciprocally placed the one at the mercy of the other, so as to give to each the potency of destroying the other."

In this year, 1905, the decision in *Lochner* v. *New York*, 198 U. S. 45, holding the New York bakers' ten-hour-law unconstitutional — one of the very few cases in which the Court has ever held invalid any State legislation designed to protect the laboring class for the welfare of society — aroused widespread public discussion, and evoked another series of attacks, such as had taken place, ten years previously, in 1896, over the Court's alleged exercise of an usurped power in passing upon the validity of statutes. It is to be noted that its critics wholly failed to distinguish between the act of holding a State statute void, and the act of holding a Congressional statute void. Not only are these two functions utterly distinct but they have different constitutional bases, and different arguments to support them.[1]

[1] See Introductory Chapter, *supra*, 14–19. Some of the attacks on the Court's power were: *Judicial Usurpation of Power*, by Camm Patteson, *Virginia Law Reg.* (1905), X; *The Great Usurpation*, by William Trickett, *Amer. Law Rev.* (1906), XL; *Judicial Dispensation from Congressional Statutes*, by William Trickett, *ibid.* (1907), XLVI; paper by Judge Walter Clark, April 27, 1906, *Amer. Law Reg.*, LIV; *Government by Judiciary*, by L. B. Boudin, *Pol. Sci. Qu.* (1911), XXVI; *The Usurped Power of the Courts*, by Allan L. Benson, *Pearson's Mag.* (1911), XVI; *Usurpation of Power by Federal Courts*, by James B. McDonough, *Amer. Law Rev.* (1912), XLVI; *Government by Judges*, by Walter Clark, *Sen. Doc. 610, 63d Cong., 2d Sess.* (1914); *Withdrawing Power from Federal Courts to Declare Acts of Congress Void*, by Sen. Robert L. Owen, *Sen. Doc. 737, 64th Cong., 2d Sess.* (1917); *Back to the Constitution*, by Walter Clark, *Amer. Law Rev.* (1916), L; *Annulment of Legislation by the Supreme Court*, by Horace A. Davis, *Amer. Pol. Sci. Rev.* (1913), VII; *Judicial Control over Legislation*, by Jackson H. Ralston, *Amer. Law Rev.* (1920), LIV; Theodore Roosevelt in *The Outlook*, Dec. 17, 1910, April 15, 1911, Jan. 6, Feb. 24, March 21, 1912.

Some defenses of the Court were as follows: *The Supremacy of the Judiciary*, by A. Ingles Clark, *Harv. Law Rev.* (1903), XVII; *Written and Unwritten Constitutions in the United States*, by Emlen McClain, *Columbia Law Rev.* (1906), VI; *The Supreme Law of the Land*, by Blackburn Esterline, *Amer. Law Rev.* (1906), XL; *Some Recent Attacks on the American Doctrine of Judicial Power*, by William M. Meigs, *ibid.*; *The Irreconcilable Conflict*, by Judge Robert G. Street, *ibid.* (1907), XLI (see especially list of articles, p. 695); *The Function of the Judiciary*, by Percy

In 1907, in the great case of *Kansas* v. *Colorado*, 185 U. S. 125, s. c., 206 U. S. 46, involving the rights of two sovereign States and of the Nation in the flow of an interstate stream, the Court restated the basic relations between the two forms of sovereignty in a Federal Government. This case had an important bearing upon the National power in relation to the subject of conservation, in holding that the United States had no power to interfere with the appropriation or use of any water within a State, except so far as might be necessary to prevent interference with or obstruction of navigable waters, or except so far as it occurred on Government land, and that it had no right over the general subject of reclamation of arid lands within the States.[1]

In 1908, two cases in which Federal statutes were held invalid as beyond the power of Congress under the

Bordwell, *Columbia Law Rev.* (1907), VII; *The Growth of Judicial Power*, by William F. Dodd, *Pol. Sci. Qu.* (1909), XXIV; *Congress and the Supreme Court*, by H. C. Bowman, *ibid.* (1910), XXV; *The Establishment of Judicial Review*, by Edward A. Corwin, *Michigan Law Rev.* (1910), IX; *A Government of Law or a Government of Men?* by Horace H. Lurton, *North Amer. Rev.* (1911), Vol. 193; *Is it Usurpation to Hold as Void Unconstitutional Laws?* by W. G. Hastings, *Green Bag* (1908), XX; *The Federal Censorship of Legislatures*, by Frederick Green, *ibid.* (1913), XLVII; *The American Doctrine of Judicial Power in Its Early Origin*, by William M. Meigs, *ibid.*; *Constitutional and Extra-Constitutional Restraints*, by Robert P. Reeder, *U. of P. Law Rev.* (1913), LXI; *Unconstitutional Law and Federal Judicial Power*, by C. H. Burr, *ibid.* (1913), LX; *The Fundamental Law and the Power of the Courts*, by Herbert Pope, *Harv. Law Rev.* (1913), XXVII; *The Judicial Bulwark of the Constitution*, by F. E. Melvin, *Amer. Pol. Sci. Rev.* (1914), VIII; *Judicial Power to Declare Legislative Acts Void*, by Oscar Haller, *ibid.* (1914), XLVIII; *The Process of Judicial Legislation*, by Morris P. Cohen, *ibid.*; *The Supreme Court, Usurper or Grantee*, by Charles A. Beard, *Pol. Sci. Qu.* (1912), XXVIII; *Power of the Supreme Court to Declare Acts of Congress Unconstitutional*, by Charles B. Stuart, *Sen. Doc. 708, 64th Cong., 2d Sess.* (1917); *The Power of Courts to Declare a Statute Void*, by George W. Williams, *Amer. Law Rev.* (1918), LII. See also the *Causes of Popular Dissatisfaction with the Administration of Justice*, by Roscoe Pound, *Amer. Bar Ass. Rev.* (1903); *Courts and Legislation*, by Roscoe Pound, *Amer. Pol. Sci. Qu.* (1913), VII; *The Supreme Court and the Constitution* (1902), by Charles A. Beard; *The Courts, the Constitution and Parties* (1912), by Andred C. McLaughlin; *The Power of the Federal Judiciary over Legislation* (1912), by J. Hampden Dougherty; *The Doctrine of Judicial Review* (1914), by Edward S. Corwin.

[1] *Suits between States, Kansas* v. *Colorado*, by Carman F. Randolph, *Columbia Law Rev.* (1902), II; *Conservation and the Constitution*, by W. B. Bosley, *Yale Law Journ.* (1911), XX.

Commerce Clause produced some criticism of the Court — *The Employers' Liability Cases*, 207 U. S. 463, and *Adair* v. *United States*, 208 U. S. 161 — the latter case involving the law prohibiting railroad discrimination against union labor. The decision that regulation of employment with reference to union conditions had no reasonable relation to interstate commerce caused much surprise and well-justified antagonism. "The inability of the Supreme Court to find any connection between the membership of a labor union and the carrying on of interstate commerce seems inexplicable," wrote Richard Olney.[1] There is little doubt that with further enlightenment of the Court as to conditions this decision will be and should be overruled.

In this same year, 1908, the power of the National Judiciary was vitally enhanced by a decision which caused much well-grounded apprehension among the States.[2] Although in *Hans* v. *Louisiana*, 134 U. S. 1, in 1890, the Court had gone far in sustaining the nonsuability of a State either by one of its own citizens or by citizens of another State, and in even overruling *Chisholm* v. *Georgia*, nevertheless, the twenty years since the death of Waite had witnessed a rapidly increasing series of cases in which suits had been sustained to restrain State officials from carrying out State laws alleged to violate the Constitution.[3] In 1891, an

[1] *Discrimination against Union Labor — Legal?* by Richard Olney, *Amer. Law Rev.* (1908), XLII; *The Living Law*, by Louis D. Brandeis, *Illinois Law Rev.* (1916), X.

[2] *The Eleventh Amendment*, by William D. Guthrie, *New York Bar Ass.* (1908); *Magna Carta* (1916), by William D. Guthrie.

[3] *Rolston* v. *Crittenden* (1887), 120 U. S. 390; *Pennoyer* v. *McConnaughty* (1891), 140 U. S. 1; see also *Ex parte Tyler* (1893), 149 U. S. 164; *Reagan* v. *Farmers' Loan & Trust Co.* (1891), 154 U. S. 362; *Scott* v. *Donald* (1897), 165 U. S. 58; *Smyth* v. *Ames* (1898), 169 U. S. 466; *Prout* v. *Starr* (1903), 188 U. S. 537; *Missouri, Kansas & Texas Railway Co.* v. *Hickman* (1901), 183 U. S. 53; *Chandler* v. *Dix* (1904), 194 U. S. 590; *Fargo* v. *Hart* (1904), 193 U. S. 490; *McNeill* v. *Southern Railway Co.* (1906), 202 U. S. 543; *Mississippi Railroad Commission* v. *Illinois, etc. Co.* (1906), 203 U. S. 335. And see *Cavanaugh* v. *Looney* (1918), 248 U. S. 453. *North Carolina* v. *Temple* (1890), 134 U. S. 22, and *Fitts* v. *McGhee* (1899), 172

injunction had been granted to restrain the Governor, Secretary of State and State Treasurer of Oregon as State Land Commissioners from selling certain land under an unconstitutional statute. In 1894, an injunction was granted to restrain the Railroad Commission and the Attorney-General of Texas from enforcing the State Railroad Rate law by instituting suits for penalties. In 1897, State constables of South Carolina were enjoined from enforcing an unconstitutional State dispensary law; and judgment was allowed against the Secretary of State of South Carolina for damages for illegal possession of land under color of a South Carolina statute. In 1898 and in 1903, the Attorney-General of Nebraska was enjoined from enforcing against the Union Pacific Railroad an unconstitutional railroad rate law of that State. In 1901, the Board of Railroad & Warehouse Commissioners of Missouri were involved in a suit. In 1904, an attempt was made to restrain the Auditor-General of Michigan from assessing alleged illegal taxes; and the State Auditors of Indiana were restrained by injunction from assessing the American Express Company under an unconstitutional tax statute. In 1906, the State Corporation Commission of North Carolina was enjoined from enforcing orders as to delivery of cars on private sidings by railroad companies; and an injunction was upheld against the enforcement by the Mississippi Railroad Commission of an order requiring railroads to stop mail trains at county seats.[1] The climax of these decisions was

U. S. 516, were practically the only suits against State officials which the Court had deemed to constitute suits against the State and hence not maintainable.

[1] See *Suits Against a State*, by Joseph Wheless, *Amer. Law Rev.* (1900), XXXIV; *Suability of States by Individuals*, by Judge Jacob Trieber, *ibid.* (1907), XLI; *Suits Against States*, by William Trickett, *ibid.*; *The Increased Control of State Activities by the Federal Government*, by Robert P. Scott, *Amer. Pol. Sci. Rev.* (1909), III; *The Progressive Unfolding of the Power of the United States*, by Simeon E. Baldwin, *ibid.* (1912), VI.

reached, in 1908, in *Ex parte Young*, 209 U. S. 123, when the Court decided that the Attorney-General of the State of Minnesota could be enjoined from bringing any proceedings to enforce against the Northern Pacific Railroad in the State Courts the State Railroad Rate Law, and could be fined for contempt if he disobeyed the injunction. "We recognize and appreciate to the fullest extent the very great importance of this case," said Judge Peckham, "not only to the parties now before the Court, but also to the great mass of the citizens of this country, all of whom are interested in the practical working of Courts of justice throughout the land, both Federal and State, and in the proper exercise of the jurisdiction of the Federal Courts as limited and controlled by the Federal Constitution and the laws of Congress." The decision aroused harsh criticism throughout the country. The Legislature of Nebraska and the Association of Attorneys-General sent memorials to Congress demanding legislation; President Roosevelt in his Annual Message in 1907 had referred to the existing discontent over the situation; and finally Congress enacted a statute, in 1910, forbidding the issue of an injunction against a State officer based on the unconstitutionality of a State statute, unless after hearing in a Court of three Federal Judges, one of whom should be a Supreme Court or Circuit Court Judge.

In 1910, the rights of the States over corporations doing an interstate business were considerably restricted by decisions in *Western Union Tel. Co.* v. *Kansas*, and *Ludwig* v. *Western Union Tel. Co.*, 216 U. S. 1, 146, in which for the first time it was made clear that there were limits to the power of a State to tax a foreign corporation for the privilege of engaging in interstate business. These cases and the further decisions in the same year in *International Text Book*

Co. v. *Pigg*, 217 U. S. 91, holding that transmission of instruction by correspondence was interstate commerce, and that a foreign corporation engaging in such business could not be required by a State to obtain a license, led many lawyers and economists to believe that the situation thus created must lead, either to placing interstate business corporations under State control by Congressional legislation like the Wilson Liquor Act, or to National licensing of such corporations or to National incorporation.[1]

On July 4, 1910, Chief Justice Fuller died after twenty-two years' service. During the first ten years of his Chief Justiceship, the composition of the Court itself had been subjected to frequent changes; a vacancy occurring nearly every year. At the death of Chief Justice Waite in 1888, the Court had consisted of Judges Miller, Field, Bradley, Harlan, Gray, Blatchford, Lamar and Matthews. Judge Matthews died on March 22, 1889; and in his place President Harrison appointed, on December 4, 1889, Judge Field's nephew, David Josiah Brewer of Kansas, who was confirmed, December 18, by a vote of fifty-three to eleven. Brewer was fifty-two years old and had been Judge of the Supreme Court of Kansas for fourteen years and Judge of the United States Circuit Court since 1884. Judge Miller died on October 14, 1890, after twenty-eight years' service; and in his place Harrison appointed Henry B. Brown of Michigan, December 23, 1890. Brown was fifty-four years old and had been a Judge of the United States District Court for fifteen years. Judge Bradley died on January 22, 1892, after twenty-two years' service; and in his place Harrison appointed, July 19, 1892, George Shiras, Jr., of Pennsylvania, who

[1] *Constitutional Law in 1909–1910*, by Eugene Wambaugh, *Amer. Pol. Sci. Rev.* (1910), IV; *State Taxation of Interstate Commerce*, by H. T. Davenport, *Pol. Sci Qu.* (1911, 1912), XXVI, XXVII.

was confirmed July 26, after strong opposition. Shiras was sixty years old and had had no previous judicial experience. The next year, Judge Lamar died, January 24, 1893, and Harrison selected as his fourth appointment to the Court, Howell E. Jackson of Tennessee, February 2, 1893, who was confirmed February 18. Jackson was sixty years old and had been a United States Circuit Court Judge; he was the first Democrat appointed by a Republican President, since Judge Field, in 1861. Within another year, Judge Blatchford died on July 7, 1894. The vacancy led to a long and bitter struggle between President Cleveland and Senator Hill of New York, the former appointing successively William B. Hornblower on September 19, 1893, and Wheeler H. Peckham, on January 22, 1894. In each case, through "Senatorial courtesy", the Senate refused to confirm, rejecting Hornblower, January 15, 1894, by a vote of twenty-four to thirty, and Peckham, February 16, 1894, by a vote of thirty-two to forty-one. Three days after the rejection of Peckham, President Cleveland filled the vacancy on February 19, 1894, by appointing Edward Douglass White, of Louisiana, who was confirmed the same day.[1] White was forty-eight years old, had been Judge of the Supreme Court of Louisiana from 1876 to 1879, and United States Senator since 1891. Judge Jackson died on August 8, 1895, after a service of but two years; and on December 3, 1895, Cleveland appointed Rufus Wheeler Peckham of New York — a man fifty-seven years of age, who had been a Judge of the New York Court of Appeals from 1870 to 1886. Judge Field resigned on October 12, 1897 (to take effect December 1), having served on the Bench thirty-four years and seven months. President

[1] See notes in *Amer. Law Rev.* (1894), XXVII, 273, as to White, the Senate, and Courtesy of the Senate.

McKinley appointed, on December 16, 1897, Joseph McKenna of California, who was confirmed January 21, 1898, after strong opposition. McKenna was fifty-five years old; he had been three times a Member of Congress and had served as Judge of the United States Circuit Court, and for six months as Attorney-General of the United States. McKinley had no further opportunity to make an appointment, as the Court remained unbroken for four years. On July 9, 1902, Judge Gray resigned; and President Roosevelt appointed, on August 11, 1902, Oliver Wendell Holmes, Jr., of Massachusetts, — a man sixty-one years of age who had been Judge of the Massachusetts Supreme Judicial Court since 1882, and Chief Justice since 1899.[1] Judge Shiras resigned February 23, 1903, and Roosevelt appointed in his place, William R. Day of Ohio, February 19, 1903. Day was fifty-three years old and had been Secretary of State from May, 1898, to February, 1899, when he had been appointed Judge of the United States Circuit Court. Judge Brown resigned, May 28, 1906, and Roosevelt appointed, December 3, 1906, William H. Moody of Massachusetts. Moody was fifty-two years of age, and had been a Congressman, Secretary of the Navy and Attorney-General. Judge Peckham died, October 24, 1909, and in his place President Taft appointed Horace H. Lurton of Tennessee, who was confirmed, December 20, 1909. Lurton was sixty-five years old and had been a Judge of the United States Circuit Court.

To succeed Chief Justice Fuller, President Taft decided to promote to the vacant position at the head of the Court, Edward Douglass White, who had served as an Associate Judge since his appointment by President

[1] See *Oliver Wendell Holmes, the Jurist*, by Leonard A. Jones, *Amer. Law Rev.* (1902), XXXVI; and see *ibid.*, 437 *et seq.* for personal description of the Judges on the Court in 1902.

Cleveland, in 1894, and who was then sixty-five years of age. The appointment, made on December 12, 1910, was notable, not only because it was the first promotion of a Judge of the Court to the Chief Justiceship since the appointment of Judge Cushing in 1796, but because a Republican President was broad-minded enough to promote a Democratic Judge.

The slight importance, however, which was to be attached to the party designations of the Judges upon the Court was never better illustrated than during Fuller's Chief Justiceship. As was pointed out by one of the law journals upon his death: "In view of the number of vacancies which will be filled by President Taft and the Senate, and the many statements which have been made concerning the political importance of these appointments, in more than eighteen years since the decision in *Field* v. *Clark*, in 1892, there has been but one case which involved a question of constitutional law and in which all the Republican members of the Court took one position and all the Democratic members took a contrary position; that case (*Snyder* v. *Bettman*, 190 U. S. 249, in 1903) was whether a Federal inheritance tax, which was collected while the property was in the hands of an executor, could constitutionally be applied to a bequest to a municipality for public purposes; the Court upheld the tax, against the dissents of the Chief Justice and Justices White and Peckham; this decision will not be of much practical importance, until the people of the United States have become far more eager to make bequests to municipalities than they are today."[1] There was only one other case during those eighteen years in which all the Republican Judges approved the decision and all the

[1] *Chief Justice Fuller*, by Robert P. Reeder, *Amer. Law Reg.* (1911), LIX. Prior to *Field* v. *Clark*, *see* only *In re Neagle* (1890), 135 U. S. 1; *Handley* v. *Stutz* (1891), 139 U. S. 417; *United States* v. *Texas* (1892), 143 U. S. 621, in 1892.

Democratic Judges disapproved — *United States* v. *Shea*, 152 U. S. 178, in 1894, a case from the Court of Claims. In the cases as to which the most political excitement raged, the *Insular Cases* and the *Northern Securities Case*, Republican and Democratic Judges united in both the majority and the minority opinions, and, as so often in the past, the mental attitude of the Judge had far more to do with the conclusions of his opinion than had his political attitude. Certainly no decision could have been forecast by a consideration of party lines in the Court.

Chief Justice White's first Term was signalized by the decisions, on May 15, 1911, of the great *Standard Oil Co.* and *American Tobacco Co. Cases*, 221 U. S. 1, 106, under the Sherman Anti-Trust Act, which produced a profound sensation in the country and revived the hopes, somewhat shaken by previous decisions, that the National power was adequate to deal with the trusts.

In 1911, the Court for the first time gave real effect to the Thirteenth Amendment prohibiting slavery or involuntary servitude, by holding a peonage law of Alabama to be in conflict with its provisions, *Bailey* v. *Alabama*, 219 U. S. 219.[1]

In 1912, it was clearly shown that the Court was not grasping for power, when, in *Pacific States Telephone and Telegraph Co.* v. *Oregon*, 223 U. S. 118, it decided that the right of the State to adopt the initiative and referendum was a political and not a judicial question, and therefore non-justiciable by the Court. "It is the Government, the political entity, which is called to the bar of the Court," said Chief Justice White, "not for the purpose of testing judicially some exercise of power assailed on the ground that its exertion has

[1] See also *Reynolds* v. *United States* (1917), 235 U. S. 133.

injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the State that it establish its right to exist as a State, republican in form." Such an issue was held not to be within the reach of judicial power.

In 1913, Congressional power to legislate as to the newspaper press of the country by prescribing publication of details of ownership was upheld, as incidental to its control of the mails and postroads; and by this decision in *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288, a fertile field for National legislation was opened up, advantage of which will undoubtedly be taken in the future.

In 1913, also, the National power over railroads received a tremendous impetus through the opinion rendered in the *Minnesota Rate Cases*, 230 U. S. 352, in which there was asserted more clearly than hitherto the power of Congress to legislate as to intrastate railroad rates when intimately connected with interstate rates. "The execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. . . . If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments, the measure of the regulation it should supply."[1] The

[1] *Power of Congress to Regulate Railway Rates*, by Victor Morawetz, *Harv. Law Rev.* (1905), XVIII; *Railroad Rate Regulation*, by Adelbert Moot, *ibid.* (1906),

next year, the power of Congress to regulate long and short hauls was upheld in the *Intermountain Rate Cases*, 234 U. S. 476.

In 1914, the doctrine of the *Granger Cases* received a restatement, and the scope of the State police power, especially with reference to the regulation of corporate rates, was defined in exceedingly broad terms in *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389.[1] In 1915, the power of the National Executive received a notable extension, when, in *United States* v. *Midwest Oil Co.*, 236 U. S. 459, President Taft's action in withdrawing public lands from settlement without express statutory authority was upheld, on the ground that a long-continued practice, known to and acquiesced in by Congress, implied authority. In the same year, the power of the Court to determine controversies between States and to enforce its decree against a State was finally settled, in *Virginia* v. *West Virginia*, 238 U. S. 202. The Fifteenth Amendment was for the first time given real effect when the "Grandfather Clause" of the Oklahoma Constitution was held to violate it, in *Guinn* v. *United States*, 238 U. S. 347. The right of Congress absolutely to prohibit the introduction of any article in

XIX; *Power of Congress to Prescribe Railroad Rates*, by Frank W. Hackett, *ibid.* (1907), XX; *The Power of Congress to Regulate Commerce*, by Frank J. Goodnow, *Pol. Sci. Qu.* (1910), XXV; *The Minnesota Rate Cases*, by John Bauer, *Pol. Sci. Qu.* (1914), XXIX; *The Minnesota Rate Cases*, by Hannis Taylor, *Harv. Law Rev.* (1913), XXVII; *The Commerce Clause and Intrastate Rates*, by William C. Coleman, *Columbia Law Rev.* (1912), XII; *The Minnesota Rate Cases and the 14th Amendment*, by Charles W. Collins, *Amer. Law Rev.* (1914), XLVII; *The Evolution of Federal Regulation of Intrastate Rates — The Shreveport Rate Cases*, by William C. Coleman, *Harv. Law Rev.* (1914), XXVIII; *The Vanishing Rate-Making Power of the States*, by William C. Coleman, *ibid.* (1914), XIV; *The Minnesota Rate Cases and the Fourteenth Amendment*, by William C. Coleman, *Amer. Law Rev.* (1914), XLVIII; *Federal Control of Intrastate Railroad Rates*, by Harry W. Biklé, *U. of P. Law Rev.* (1915), LXIII.

[1] *The United States Supreme Court and Rate Regulation as Affected by the Distribution of Governmental Powers in the Constitution*, by Robert P. Reeder, *Amer. Law Reg.* (1909), LVII; *United States Supreme Court and Rate Regulation*, by Douglas D. Storey, *U. of P. Law Rev.* (1916), LXIV.

foreign trade was upheld, in *Weber* v. *Freed*, 239 U. S. 325, and *Brolan* v. *United States*, 236 U. S. 216.

In 1916, the effect of the Income Tax Amendment was construed in *Brushaber* v. *Union Pacific R. R.*, 240 U. S. 1. The power of the States to obstruct or deny removal of cases into the United States Courts was again restricted and redefined in *Donald* v. *Philadelphia and Reading Coal & Iron Co.*, 241 U. S. 329.[1]

In 1917, the power of Congress to regulate the instrumentalities of interstate commerce received a radical extension, when the Court upheld the Adamson Eight-Hour Law, in *Wilson* v. *New*, 243 U. S. 332.[2]

In the years succeeding the accession of White to the Chief Justiceship, the composition of the Court rapidly changed, Judges Peckham, Brewer, Harlan, Lurton, Lamar and Hughes leaving the Bench within the space

[1] See *supra*, III, 408.

[2] The original plan of this book did not contemplate the consideration of any cases later than 1917; but in order to show the steady development and judicial support of the powers of the National Government, during the years 1918 to 1921, the following cases should be noted.

The Selective Service Act was upheld in *Selective Draft Cases*, 245 U. S. 366, and *Goldman* v. *United States*, 245 U. S. 474, in 1918. The Espionage Act was upheld in *Schenck* v. *United States*, 249 U. S. 47, and *Debs* v. *United States*, 249 U. S. 211, in 1919, and in *Schaefer* v. *United States*, 251 U. S. 466, in 1920, and in *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, in 1921. The Government wartime control of railroads was upheld in *Northern Pacific R. R.* v. *North Dakota*, 250 U. S. 135, and the Government wartime control of telegraph and telephones in *Dakota Central Telephone Co.* v. *South Dakota*, 250 U. S. 163, in 1919. The Wartime Prohibition Act was upheld in *Hamilton* v. *Kentucky Distilling Co.*, 251 U. S. 146, and in *Ruppert* v. *Caffey*, 251 U. S. 264, in 1919.

The national power to regulate by treaty the subject of migratory birds was upheld in an epoch-making decision in *Missouri* v. *Holland*, 252 U. S. 416, in 1920. The Volstead Prohibition Act and the 18th Amendment were upheld in *National Prohibition Cases*, 253 U. S. 350, in 1920. The 19th Amendment was upheld in *Hawke* v. *Smith*, 253 U. S. 221, 231, in 1920. The Farm Loan Act of 1916 was upheld in *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, in 1921. The Trading with the Enemy Act was upheld in *Stoehr* v. *Wallace*, 255 U. S. 239, in 1921.

The chief Acts of Congress held invalid were four: the Child Labor Law of 1916, in *Hammer* v. *Dagenhart*, 247 U. S. 251, in 1918; the Income Tax Law of 1916, taxing stock dividends, in *Eisner* v. *Macomber*, 252 U. S. 189, in 1920; the Income Tax Law of 1919, taxing salaries of United States Judges, in *Evans* v. *Gore*, 253 U. S. 245, in 1920; and the Lever Food Control Act of 1917, in *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, in 1921.

of seven years — President Taft having an opportunity to appoint five Judges, a majority of the Court, and President Wilson, three. On March 28, 1910, Judge Brewer died after a service of twenty years and in his place, Taft appointed Charles Evans Hughes of New York, who was confirmed May 2, 1910. Hughes was forty-eight years of age and had been Governor of New York, but had had no previous judicial experience. On November 20, 1910, Judge Moody resigned, and in his place Taft appointed Willis Van Devanter of Wyoming, who was confirmed December 15, 1910. Van Devanter was fifty-one years old and had been an Assistant Attorney-General and Judge of the United States Circuit Court. On December 15, 1910, the appointment of Joseph Rucker Lamar of Georgia was confirmed to fill the vacancy caused by the promotion of Judge White. Lamar was fifty-three years old, and had served upon the Supreme Court of Georgia. Judge Harlan died on October 14, 1911. To the vacant place, President Taft appointed on February 19, 1912, Mahlon Pitney of New Jersey, who was confirmed March 13, 1912. Pitney was fifty-four years old and had been Judge of the Supreme Court and Chancellor of New Jersey. Judge Lurton died on July 12, 1912, and President Wilson appointed on August 19, 1914, James Clark McReynolds of Tennessee, a man fifty-two years of age who had served as Attorney-General for a year and a half. Judge Lamar died on January 2, 1916, and in his place Wilson appointed on January 28, 1916, Louis D. Brandeis of Massachusetts, who was confirmed on June 1, 1916, by a vote of forty-seven to twenty-two, after a long and bitter contest. Brandeis was fifty-nine years old and had had no previous judicial experience. On June 10, 1916, Judge Hughes resigned in order to accept his nomination as Republican

candidate for the Presidency, and in his place Wilson appointed on July 14, 1916, John H. Clarke of Ohio, a man fifty-eight years of age, who had served as Judge of the United States District Court.[1]

During these thirty years from 1888 to 1918, there were two radical extensions and two restrictions of the Court's jurisdiction through Congressional action. By the Act of March 2, 1907, appeals by the Government in criminal cases were authorized on rulings by inferior United States Courts on demurrer, plea in abatement and motion to quash.[2] By the Act of December 23, 1914, the Court was authorized to review on certiorari, cases in the State Courts in which the decision is against the validity of a State statute claimed to violate the Constitution. This was the first important change in the Twenty-Fifth Section of the Judiciary Act of 1789; and it had long been advocated by the American Bar Association. It enabled the Court in the future to take jurisdiction in such cases as the *Ives Case*, in which the New York Court of Appeals had held the Workmen's Compensation law of that State repugnant to the Constitution, and in similar cases in which the State Courts had hitherto been less progressive in their constitutional doctrines and more inclined to hold State laws invalid.[3] By the Act of 1891 establishing the

[1] Chief Justice White died, May 19, 1921; and to succeed him, President Harding appointed William Howard Taft, June 30, 1921.

[2] The statute had been recommended as early as 1902 by Attorney-General Knox. It was enacted largely through President Roosevelt's insistence, after the decision by Judge Humphreys in *United States* v. *Armour & Co.*, 142 Fed. 808, holding the packers, indicted under the Meat Inspection Law, to be entitled to immunity because of having testified before the Bureau of Corporations; see also *59th Cong., 2d Sess.*, debate in Senate, Feb. 4, 13, 1907; *United States* v. *Sanges* (1892), 144 U. S. 310, in which it was held that the United States has no power to sue out a writ of error in a criminal case.

[3] Prior to 1825, the decided cases averaged 24 a year; from 1826 to 1830, 58; in 1836 there were 37 cases disposed of; in the five years from 1846 to 1850, an average of 71. In the October, 1890, Term, there were 1816 cases on the docket and the Court disposed of 617; in the October, 1891, Term, there were 1582, of which 496 were disposed of, and at this time it took three years to reach a case for

Circuit Court of Appeals, Congress afforded a marked relief to the Court by restricting its appellate jurisdiction; and by the Court of Customs Appeals Act of 1909, the Court was further relieved of customs cases.

argument. *The Needs of the Supreme Court*, by William Strong, *North Amer. Rev.* (1895), CXXXII; and see 140 U. S. App. as to the effect of the Act of 1891.

CHAPTER THIRTY-EIGHT

COMMERCE AND THE POLICE POWER

1888–1918

In all this development of the National sovereignty during the thirty years after the death of Chief Justice Waite, one feature deserves more detailed comment, namely the awakening of Congress to the realization of the vast power wrapped up in the Commerce Clause, its increasing exercise of that power, and the breadth of the decisions by which the Court has sustained such exercise of power.[1]

As was said in 1907: "The development of the power was for one hundred years rather in a negative way than in a positive way. The Court was called upon to say what the States could not do, instead of what Congress could do — except as the one necessarily followed from the other. . . . The tendency in this country towards a centralization of power is increasing. The field of the National Government is constantly widening. . . . A Unity is growing out of a Union, and the primary source of all this Nationalizing power is the Commerce Clause."[2]

The first important exercise by Congress of its power under the Commerce Clause, was the Interstate Commerce Act of 1887; but while this law was construed

[1] For an early appreciation and fear of this tendency, see *The Supreme Court and Interstate Commerce*, by Charles A. Culbertson, *Amer. Law Rev.* (1890), XXIV.

[2] *The Constitutional Opinion of Justice Holmes*, by Felix Frankfurter, *Harv. Law Rev.* (1916), XXIX; *Development of the Commerce Clause in the Federal Constitution*, by Judge Walter C. Noyes, *Yale Law Journ.* (1907), XVI.

and applied by the Court in a vast number of cases, it was not until six years later that Congress took further advantage of its constitutional powers to regulate common carriers engaged in interstate and foreign commerce, by the passage of the Safety Appliance Act of 1893 (further developed by the Acts of 1896, 1908 and 1911); and by the Harter Act of 1893 regulating bills of lading and the liability of sea-carriers.[1] In 1903, however, the enactment of the Elkins Act was followed by a series of statutes regulating such carriers — the Automatic Coupler Act of 1903, the Hours of Service Acts of 1907 and 1916, the Employers' Liability Acts of 1905 and 1908, the Carmack Amendment of 1906,[2] the Hepburn Act of 1906,[3] the Interstate Express Company Act of 1906, the Transportation of Explosives Act of 1909, the Mann-Elkins Act of 1910 regulating also telegraph, telephone and cable companies, the Boiler Inspection Acts of 1911 and 1915, the United States Shipping Board Act of 1916 regulating carriers by water, the Bills of Lading Act of 1916, the Adamson Act of 1916 regulating hours of labor and wages of railroad employees, the Car Service Act of 1917. All of these statutes, except the first Employers' Liability Act, were upheld by the Court.[4] In sustaining the power of Congress over carriers, it reached an extreme point when, in the *Adamson Law Case* in 1917, it upheld the right to fix wages and hours of labor in case of an emergency and for the purpose of keeping

[1] *The Harter Act; Recent Legislation in the United States Respecting Bills of Lading*, by Everett P. Wheeler, *Amer. Law Rev.* (1899), XXXIII; *The Harter Act*, by Frederick Green, *Harv. Law Rev.* (1902) XVI.

[2] See *Adams Express Co.* v. *Croninger* (1913), 226 U. S. 491.

[3] *United States* v. *Delaware & Hudson Co.* (1909), 213 U. S. 366; *Constitutional Questions Involved in the Commodity Clause of the Hepburn Act*, by William D. Lewis, *Harv. Law Rev.* (1908), XXI; *Recent Problems on Railway Legislation*, by William Z. Ripley, *Pol. Sci. Qu.* (1912), XXVII.

[4] *The National Employers' Liability Act*, by Jacob Trieber, *Amer. Law Rev.* (1915), XLIX.

interstate traffic open and continuous.[1] "A majority of the Court has established a doctrine the application of which it is to be hoped the good sense of Congress will strictly confine within the limits of an urgent necessity." This comment, written shortly after the decision, probably expresses the general view of the public.

The second important exercise by Congress of its power under the Commerce Clause was an attempt on its part to exercise the National authority for the purpose of enlarging the powers of the States. By the decisions of the Court in *Bowman* v. *Chicago & Northwestern R. R.*, 125 U. S. 465, in 1888, and in *Leisy* v. *Hardin*, 135 U. S. 100, — the *Original Package Case* — in 1890, which denied the validity of State prohibition laws affecting intoxicating liquors during the period of interstate transportation, the power of the States to enforce their liquor legislation effectively had been seriously impaired — "an invasion by the Federal Government of State domain and a National destruction of State prohibition." [2] By the Wilson Act of 1890, Congress restored to the States their control over liquor upon its arrival within the State; but this statute resulted in little benefit to the prohibition States, since, while the Court held it constitutional, it also held that

[1] See *Wilson* v. *New* (1917), 243 U. S. 332; *The Constitutionality of the Eight-Hour Railroad Law*, by M. H. Lauchheimer, *Columbia Law Rev.* (1916), XVI; *Due Process and the Adamson Law*, by Thomas R. Powell, *ibid.* (1917), XVII; *Railway Strikes and the Constitution*, by Arthur F. Ballantyne, *ibid.*; *The Adamson Act Decision*, by Frank W. Hackett, *Amer. Law Rev.* (1918), LII; *The Supreme Court on the Adamson Law*, by C. W. Burr, *Minnesota Law Rev.* (1918), I; *The Adamson Law Decision*, by C. K. Burdick, *Cornell Law Qu.* (1917), II; *The Supreme Court and the Adamson Law*, by Thomas R. Powell, *U. of P. Law Rev.* (1917), LXV.

[2] See *The Law Governing an Original Package*, by John B. Uhle, *Amer. Law Reg.* (1890), XXXVIII; *Recent Centralizing Tendencies in the Supreme Court*, by Frederic P. Powers, *Pol. Sci. Qu.* (1890), V; see also *Amer. Law Rev.* (1890), XXIV, 474, 490; *Lyng* v. *Michigan* (1890), 135 U. S. 161; *Eilenbecker* v. *Plymouth Co.* (1890), 134 U. S. 31; *In re Rahrer* (1891), 140 U. S. 545; *Crowley* v. *Christensen* (1890), 137 U. S. 86; *Rhodes* v. *Iowa* (1898), 170 U. S. 412; *Vance* v. *Vandercook Co.* (1898), 170 U. S. 438; *Adams Express Co.* v. *Iowa* (1905), 196 U. S. 147; *Louisville & Nashville R. R.* v. *Cook Brewing Co.* (1912), 223 U. S. 70.

the word "arrival" meant not physical arrival within the State but commercial arrival by delivery to the consignee, the status of interstate transportation not being concluded until such delivery. The same doctrine as to the want of power in the States to interfere with the objects of interstate transportation when in their original packages was applied by the Court to State legislation on the subjects of oleomargarine and cigarettes.[1] For thirteen years, the National power over liquor transportation growing out of this Original Package doctrine reigned supreme. "The Interstate Commerce Clause, intended to be a harmonizer among the States, has been made a weapon of offense by which the liquor producing States have compelled prohibition States to receive intoxicating liquors willy-nilly, and thus have made the enforcement of local prohibition laws substantially impossible," said Assistant Attorney-General Denison, in 1914. "So there has arisen what amounts to a direct offensive warfare by the Federal Government, in alliance with certain States, against the domestic, social and economic policies of other States." To put an end to this situation, Congress passed the Webb-Kenyon Act of 1913, penalizing the shipment or transportation of liquor intended to be received, possessed or sold either in original package or otherwise in violation of State laws. Though the constitutionality of this law was doubted by President Taft and by most of the Bar, it was supported by the Court in decisions which gave greatly added scope to the power of Congress to transfer its authority to the

[1] See *Schollenberger* v. *Pennsylvania* (1898), 171 U. S. 1, as to a State oleomargarine law; and see the Oleomargarine Act of 1902 restoring control to the States; *Austin* v. *Tennessee* (1900), 179 U. S. 343; *Cook* v. *Marshall Co.* (1905), 196 U. S. 261; *The Latest Phase of the Original Package Doctrine*, by Shackelford Miller, *Amer. Law Rev.* (1901), XXXV; *What is the Original Package Doctrine*, by Morris M. Townley, *ibid.*; *The Original Package Ineptitude*, by William Trickett, *Columbia Law Rev.* (1906), VI.

States.[1] The Reed Amendment of 1917, also supported by decisions of the Court, was the culmination of this form of National legislation.[2]

The third important example of the exercise by Congress of its power under the Commerce Clause, the Sherman Anti-Trust Act of 1890, has been the subject of extensive judicial construction, from 1895 until the present day. At first, the meaning of the terms of this Act was supposed by Congress to be free from doubt, and though there was some criticism by the Bar, an article in a law journal in 1893 expressed the general view: "The Act has been criticised because it contains no definition; but the common law terms used in it seem to be sufficient. The language is searching and the provisions are drastic." This confidence in the clarity of the language of the Act was soon dispelled. Owing to the unfortunate manner in which the facts were alleged and proved in the first decided case, *United States* v. *E. C. Knight Co.*, 156 U. S. 1, the opinion, holding the operations of the sugar refiners involved to be legal, served to discourage further attempts to invoke the statute in relation to commercial business. Decisions followed, in 1898 holding railroads to be subject to the law, in 1904 holding stockholding corporations to be within its purview, in 1908 holding combinations of laborers in a boycott to be liable under the law.[3] In 1911, twenty-one years

[1] *Clark Distilling Co.* v. *Western Maryland R. R.* (1917), 242 U. S. 311; *The Webb Act*, by Allen H. Kerr, *Yale Law Journ.* (1913), XXII; *State Rights and the Webb-Kenyon and the Liquor Law*, by Winfred T. Denison, *Columbia Law Rev.* (1914), XIV; *Unlawful Possession of Liquor and the Webb-Kenyon Act*, by Lindsay Rogers, *ibid.* (1916), XVI, and see especially long list of articles on the Webb-Kenyon Act cited in *Decisions of the Supreme Court, 1914–1917*, by Thomas R. Powell, *Amer. Pol. Sci. Rev.* (1918), XII.

[2] *The Reed Bone-Dry Amendment*, by J. K. Graves, *Virginia Law Rev.* (1917), IV; *United States* v. *Hill* (1918), 248 U. S. 420; *United States* v. *Simpson* (1920), 252 U. S. 465; *Life, Liberty and Liquor*, by Lindsay Rogers, *Virginia Law Rev.* (1919), VI.

[3] *Strikes and Trusts, Amer. Law Rev.* (1893), XXVII. For discussion of the Trusts and the Sherman Act at varying stages in its early career, see the following

after the passage of the Act, decisions in the *Standard Oil Co.* and *American Tobacco Co. Cases*, 221 U. S. 1, made more clear the general scope and limitations of the National control of combination in restraint of interstate trade.[1] Later decisions have not materially extended the National power. When it appeared that unreasonable restraint and improper methods by which the restraint was attained or maintained were to be controlling features in determining the legality of the corporate combination, it became more and more the general belief that the National power over these interstate combinations should be exercised in regulation, rather than in destruction, and that the economic evils — the evils of monopoly control and unjust and unfair business methods — must be remedied, without attacking the principle of mere combination. It was largely on this theory that the Clayton Act and the Act establishing the Federal Trade Commission were adopted, in 1916.[2] In addition

articles: *The Economic and Social Aspects of Trusts*, by George Gunton, *Pol. Soc. Qu.* (1888), III; *"Monopoly" under the National Anti-Trust Act*, by William F. Dana, *Harv. Law Rev.* (1894), VII; *Federal Trust Regulation*, by Carman F. Randolph, *Pol. Sci. Qu.* (1897), XII; *Federal Anti-Trust Law*, Report of Committee on Jurisprudence and Law Reform, *Amer. Bar Ass. Rep.* (1897), *Amer. Law Rev.* (1897), XXXI; *The Anti-Trust Act, The Case of the Trans-Missouri Traffic Association*, by William D. Guthrie, *Harv. Law Rev.* (1897), XI; *Anti-Trust Legislation*, by Frederick H. Cooke, *Amer. Law Rev.* (1899), XXXIII; *Trusts*, by J. B. Clark, *Pol. Sci. Qu.* (1900), XV.

[1] *The Supreme Court and the Anti-Trust Act*, by Victor Morawetz, *Columbia Law Rev.* (1910), X; *The Sherman Anti-Trust Law*, by M. S. Hottenstein, *Amer. Law Rev.* (1910), XLIV; *Has the Sugar Case been Overruled?* by Stuart Chevalier, *ibid.; The Standard Oil Decision*, by H. A. Wilgus, *Michigan Law Rev.* (1911), IX; *The Federal Anti-Trust Act*, by Robert L. Raymond, *Harv. Law Rev.* (1910), XXIII; *"Anti-Trust" Legislation and Litigation*, by William B. Hornblower, *Columbia Law Rev.* (1911), XI; *The Standard Oil and Tobacco Cases*, by Robert L. Raymond, *ibid.* (1911), XXV; *The Oil and Tobacco Cases*, by Albert H. Walker, *Amer. Law Rev.* (1911), XLV; *The Recent Trust Decision*, by H. R. Seager, *Pol. Sci. Qu.* (1911), XXVI; *Recent Interpretation of the Sherman Act*, by George W. Wickersham, *Michigan Law Rev.* (1911), X; *The Supreme Court and the Sherman Anti-Trust Act*, by Harold Evans, *Amer. Law Reg.* (1911), LIX; *The Standard Oil Case and American Tobacco Cases*, by Harold Evans, *U. of P. Law Rev.* (1912), LX; *The Federal Anti-Trust Act*, by Roland L. Foulke, *ibid.* (1913), LXII; *What the Sherman Anti-Trust Act has Accomplished*, by Alfred Hayes, *Amer. Law Rev.* (1913), XLVII.

[2] *Unfair Competition*, by W. H. S. Stevens, *Pol. Sci. Qu.* (1914), XXIX; *The New Anti-Trust Act*, by Henry R. Seager, *ibid.* (1915), XXX; *The Federal Trade*

Congress legislated regarding monopolies and restraint of trade by enacting sections 73 to 77 of the Wilson Tariff Act in 1894 as to combinations of importers, and in the Panama Canal Act of 1912, forbidding ownership by common carriers of competing water lines, and in the Hepburn Act of 1916 making it unlawful for a railroad to transport, except for its own needs, any article manufactured, mined or produced by it directly or indirectly.

Until the year 1903, Congress had confined the exercise of its powers under the Commerce Clause almost entirely to the subject of intoxicating liquor, common carriers and trusts. In that year, however, the decision of the Court in the great case of *Champion* v. *Ames*, 188 U. S. 321, upholding the Act of 1895 by which Congress forbade all transportation of lottery tickets in interstate commerce, disclosed the existence of a hitherto unsuspected field of National power. While the Court expressly stated that, in sustaining the right absolutely to prohibit interstate commerce in lottery tickets, it must not be understood to uphold a general right to exclude any and all articles from such commerce, nevertheless, the reasoning on which the opinion was based left a very wide discretion to Congress. Hitherto, it had been largely left to the States under the exercise of the police power to decide each for itself what articles of commerce should or should not be brought within the State or produced within the State for transportation elsewhere. Now the Court announced the doctrine that Congress might decide to what extent and under what regulations such articles might be transported. The decision caused much uneasiness among those who feared the vesting of such

Commission and Development of the Law which Led to Its Establishment, by James A. Fayne, *Amer. Pol. Sci. Rev.* (1915), IX.

broad powers in the National Government and such extinction of the State police powers; and many sympathized with Chief Justice Fuller's remark in his dissenting opinion that "our form of government may remain, notwithstanding legislation or decision, but, as long ago observed, it is with governments, as with religions, that the form may survive the substance of the faith." Many agreeing with the author of an article entitled: "Is Congress a Conservator of the Public Morals?", stated that the decision was to be viewed with alarm.[1] "The case is of extraordinary interest and of far-reaching consequence. The Court has unfolded a vast power wrapped up in the Commerce Clause," said another writer. "The police powers of the State are extinct, so far as their exercise bears upon any of the subjects entrusted to Congress by the Constitution, notably upon intercommunication with the States or with foreign parts. In the execution of the powers over commerce and over the mails, Congress may enact laws which regulate the internal affairs of States that are not in any way dependent upon or connected with communication with the exterior," wrote another. The practical result of the case was the creation of a Federal police power — the right to regulate the manner of production, manufacture, sale and transportation of articles and the transportation of persons, through the medium of legislation professing to regulate commerce between the States. Congress took very swift advantage of the new field thus opened to it. In 1903 and 1905, it passed the Animal Contagion Disease and the enlarged Animal Quarantine

[1] See *Amer. Law Rev.* (1904), XXXVIII; *Three Constitutional Questions*, by Alfred Russell, *ibid.* (1904), XXXVII; *Is There a Federal Police Power?* by Paul Fuller, *Columbia Law Rev.* (1904), IV; *The Exclusive Power of Congress to Regulate Interstate and Foreign Commerce*, by David W. Brown, *ibid.*; *Latest Development of the Interstate Commerce Power*, by Edward B. Whitney, *Michigan Law Rev.* (1902), I.

Acts; in 1906, the Pure Food Act; in 1905 and 1906, the Metals Hallmark Acts; in 1905, 1912, 1915 and 1917, the Plant Quarantine Acts; in 1907, the Meat Inspection Act; in 1909 and 1914, the Narcotics Acts; in 1910, the White Slave Traffic Act; in 1910, the Insecticide Act; in 1912, the Apple-Grading Act and the Adulterated-Seed Act; in 1913, the Serums and Toxins Act; in 1916, the Warehouse Act and the Grain Standards Act; in 1916, the Child Labor Act.[1]

All this legislative activity in fields theretofore reserved to State action was the subject of constant comment by legal writers,[2] and the pendency in Congress of bills to regulate child labor in the States by debarring the products of such labor from interstate transportation presented the question as to the limits of Congressional power in a new light. "The new proposition is this," said Attorney-General Knox in 1907, "that Congress has the power to regulate commerce, including its instrumentalities, *and likewise* power to regulate the persons by whom articles of commerce are produced in respect to matters not connected with commerce . . . , to prohibit articles of value, which are in themselves innocuous and which are lawfully made or produced in a State, for reasons not affecting interstate commerce."[3]

[1] See *Hipolite Egg Co.* v. *United States* (1911), 220 U. S. 45, sustaining the Pure Food Act; *Hoke* v. *United States*, 227 U. S. 308, sustaining the White Slave Traffic Act; and *United States* v. *Jin Fuey Moy* (1916), 241 U. S. 394, sustaining the Narcotics Act of 1914.

[2] *Power of Congress to Regulate Commerce*, by Frank J. Goodnow, *Pol. Sci. Qu.* (1910), XXV; *Powers of Regulation Vested in Congress*, by Max Pam, *Harv. Law Rev.* (1910), XXIV; *Federal Control of Interstate Commerce*, by George W. Wickersham, *ibid.* (1910), XXIII; *Nature and Scope of the Power of Congress to Regulate Commerce*, by Frederick H. Cooke, *Columbia Law Rev.* (1911), XI; *The Exclusive Power of Congress over Interstate Commerce*, by Charles W. Needham, *ibid.*

[3] *The Exclusiveness of the Power of Congress over Interstate and Foreign Commerce*, by James S. Rogers, *Amer. Law Rev.* (1905), LIII; *Recent Developments in the Law Relating to Interstate Commerce*, by Morris M. Cohn, *Amer. Law Rev.* (1908), XLII; *The Development of the Federal Power to Regulate Commerce*, by Philander C. Knox, *Yale Law Journ.* (1908), XVII; *Power of the States over Commodities Excluded by Congress from Interstate Commerce*, by Lindsay Rogers, *Yale Law Journ.* (1915),

Fear of this legislative trend was expressed before the American Bar Association in 1917: "This case was undoubtedly the Pandora's box from which burst forth with amazing speed and ever-increasing velocity the tendency to federalize and centralize, beyond the dreams of Alexander Hamilton, a government whose centripetal forces had already been too greatly strengthened as a result of the Civil War. It was the beginning of that steady, unending, unceasing movement in Congress to stretch far beyond its real meaning and far beyond what any fair construction, however liberal, warranted the Commerce Clause of the Constitution. This movement has progressed so steadily, has been pressed so persistently, and has gone so far that it threatens to utterly annihilate our dual system of government, to utterly destroy the police powers of the several States, and finally to be about to deprive our people of the inestimable blessings of local self-government, unless it be checked speedily and sharply."[1] That there was a limit to Congressional power under the Commerce Clause was finally settled by the Court in *Hammer* v. *Dagenhart*, 247 U. S. 251, in 1918, when it held the Child Labor Law of 1916 unconstitutional.[2]

While, however, the so-called National police powers may be restricted under the Commerce Clause, it is to be noted that there seems to be very little restriction on the extent to which the National Government may regulate, under the taxing power, the production, manufacture, sale and transportation of articles within the States. As early as 1869, it was held, in *Veazie Bank* v.

XXIV; *Congressional Prohibition of Interstate Commerce*, by Thomas I. Parkinson, *Columbia Law Rev.* (1916), XVI; *Working towards a Federal Domain*, by R. L. Schuyler, *Pol. Sci. Qu.* (1913), XXVII.

[1] *The Regulation of Commerce Between the States*, by Thomas W. Hardwick, *Amer. Bar Ass. Rep.* (1917).

[2] But see *The Federal Power to Regulate Child Labor*, by William D. Lewis, *U. of P. Law Rev.* (1914), LXII.

Fenno, 8 Wall. 533, that the taxing power might be exercised for the purpose of destroying or regulating the thing taxed; and in 1904, this doctrine received further affirmation in the decision in *McCray* v. *United States*, 195 U. S. 27, involving the Oleomargarine Act.[1] The number of subjects, the manufacture and sale of which Congress has regulated in great detail is large and constantly increasing, of which the following statutes are an example — the Oleomargarine Acts of 1886 and 1902; the Filled Cheese Act of 1896; the Mixed-Flour Act of 1898; the White Phosphorus Match Act of 1912; the Harrison Narcotics Act of 1914; the Cotton Fixtures Act of 1916.

While it has thus upheld Congressional powers of affirmative action under the Commerce Clause, and under the provisions of the Constitution relating to post-roads and taxes, and has thus developed a so-called National police power, the Court has demonstrated an equally strong desire to uphold State legislation passed in the exercise of the State police power, whenever such legislation could be construed as no interference with the authority of the National Government. State laws challenged as violative of the Fourteenth Amendment and enacted under the police power generally involve mere questions between the State and the individual. But those State laws which are challenged as in conflict with the Commerce Clause often present questions of the respective rights of the State and of the National Governments. The difficulty of drawing the line between permissible protection of the public welfare by the State and unlawful encroachment

[1] See also *Cornell* v. *Coyne* (1904), 192 U. S. 418; *Federal Taxation of Interstate Commerce*, by Simeon E. Baldwin, *Harv. Law Rev.* (1908), XXII; *Nullification by Indirection*, by James M. Beck, *ibid.* (1910), XXIII; *Power of Regulation Vested in Congress*, by Max Pam, *ibid.* (1910), XXIV; *May Congress Levy Money Exactions Designated as "Taxes" Solely for the Purpose of Destruction?* by John B. Waite, *Michigan Law Rev.* (1908), VI.

on the Nation's power to regulate commerce has been recognized by the invention of the popular phrase, "the twilight zone."[1]

The police power of a State, so far as the Federal Constitution is concerned, ultimately means that degree of interference with individual freedom of action or with use of private property in the interest of the public welfare, which the Judiciary considers not to be arbitrary, or not to be unduly violative of National rights in commerce between the States, at any given time and in the light of prevailing conditions. It is the judicial interpretation of the concept of private property, the fixing of the metes and bounds to the use of such property and to the liberty of the individual.[2] By the Legislature primarily, but by the Judiciary finally, individual rights are adjusted to existing social and economic conditions, through the settlement of the question of how far governmental regulation may, without compensation, impose burdens on property or action. As a consequence, the idea of vested rights in any well governed community must develop correspondingly to the ever changing conditions of time and place. It is in the progressive recognition and application of this principle that the Court has performed one of its greatest services.

State statutes regulative or restrictive of individual

[1] The boundary line between the State police power and the Commerce Clause has been the subject of a vast amount of discussion; for early articles, see *What is the Test of a Regulation of Foreign or Interstate Commerce?* by Louis M. Greeley, *Harv. Law Rev.* (1887), I, stating that "no class of cases is more perplexing"; *Police Power and Interstate Commerce,* by William R. Howland, *ibid.,* IV, attacking the decision in *Leisy* v. *Hardin; The Relation of the Police Power of the States to the Commerce Power of the Nation,* by Charles C. Binney, *Amer. Law Rev.* (1891), XXV.

[2] *Property and Contract* (1918), by Richard T. Ely, I, 205–226, II, 699. See *What is the Police Power?* by Walter W. Cook, *Columbia Law Rev.* (1907), VII; *The Sociological Interpretation of Law,* by Joseph H. Drake, *Michigan Law Rev.* (1918), XVI: "The invocation and application of the police power is nothing more than an appeal to the sociological method of interpreting our Constitution and laws."

property or action, and passed under alleged authority of the State police power, have been attacked in the Court in almost six hundred cases during the past thirty years. The bulk of these statutes were claimed to violate the Fourteenth Amendment; the remainder were claimed by the parties affected to constitute an interference with National control of commerce. With comparatively few exceptions of importance, the Court has upheld the validity of the State legislation.[1] Between the years 1889 and 1918 inclusive, it has decided about 790 cases, in which statutes were attacked under the Due Process and the Equal Protection of the Law Clauses of the Fourteenth Amendment. Of these, 422 involved State statutes passed under the police power; 196, State statutes passed under the taxing power; and 172, State statutes prescribing administrative or judicial procedure. Of these 422 cases arising under the police power (being those which involved the new and progressive social and economic legislation of modern times), the Court held the statutes unconstitutional in 53 cases, two thirds of which, however, involved the rates and regulation of public-service corporations; of the remainder, 2 involved municipal improvements; 5, anti-trust laws; and only 14 involved legislation affecting the general rights and liberties of individuals. The decision in only 2 of these 14 cases involving what has been termed "social justice" legislation aroused any widespread criticism, one being *Lochner* v. *New York*, in 1905, which, if not now practically overruled, is certain in the near future to be disregarded by the Court;[2]

[1] See for detailed synopsis of cases to the year 1912, *The Progressiveness of the United States Supreme Court*, by Charles Warren, *Columbia Law Rev.* (1913), XIII, reprinted as *Sen. Doc. 30, 63d Cong., 1st Sess.* (1913); *A Bulwark to the State Police Power*, by Charles Warren, *Columbia Law Rev.* (1913), XIII; *The Honor Roll of the Police Power*, by B. L. Mayes, *Amer. Law Rev.* (1916), L.

[2] But see *Police Power and Civil Liberty*, by S. Whitney Dunscumb, Jr., *Columbia Law Rev.* (1906), VI, terming the Court a "bulwark of American liberty", because

the other was *Coppage* v. *Kansas*, 236 U. S. 1, decided in 1915, in which a Kansas law forbidding employers to coerce, require or influence employees not to join or remain in labor-unions was held invalid — a decision which, with the increasing development of the aspect of the social desirability of labor-unions, is likely to be overruled.[1]

A similar record was made in cases in which the State statutes were challenged under the Commerce Clause of the Constitution, and in which the Court has upheld the State legislation as within the scope of the police power in substantially all cases involving State statutes promotive of "social justice." Under the Commerce Clause, the Court decided 216 cases, of which 142 involved statutes passed under the police power, and 94 under the taxing power In these 142 cases arising under the police power, the Court held the State statutes unconstitutional in 46, of which 24 were corporation regulation laws, 9 were liquor and cigarette laws, and only 13 were general progressive legislation. In no one of these 13 cases was there any strong criticism of the decision.

It may fairly be said that the support which the Court has thus given to the police power of the States has been one of the most remarkable features of its career. Certainly a litigant who hopes to overturn the deliberate judgment of a State Legislature as expressed in this form of legislation has a very scanty hope of assistance from the Court.[2]

of this decision. Lawyers and laymen alike have progressed far from such an opinion at the present time.

[1] *The Living Law*, by Louis D. Brandeis, *Illinois Law Rev.* (1916), X; "In the *Coppage Case*, the Supreme Court showed the potency of mental prepossessions."

[2] A more detailed statement of laws upheld by the Court will serve to make this even clearer. Of laws regulating sales of pure food and other merchandise and the conduct of mercantile business, the Court has upheld the law in 32 cases challenged under the Fourteenth Amendment and in 11 challenged under the Commerce Clause; and in only 5 cases has it held a law unconstitutional. Laws

So long as it shall adhere to the course which it has followed from 1889 to 1918, there will be no possible justification for the demand for recall of Judges or of judicial decisions — a cry which was, at its origin, based purely on ignorance of the facts as to the Court's decisions.[1] At present, the demand made by certain labor organizations for the abolition of the Court's power to pass upon the constitutionality of statutes seems based wholly on the claim that the Court has

regulating wages it has upheld in 12 cases; relating to employees' injuries in 9 cases under the Fourteenth Amendment, and 1 under the Commerce Clause; workmen's compensation laws in 5 under the Fourteenth Amendment, and in 1 under the Commerce Clause; other labor laws in 8 cases under the Fourteenth Amendment, and 1 under the Commerce Clause. In only 3 cases has it held a State statute regarding labor unconstitutional. (*Lochner* v. *New York* (1905), 198 U. S. 45; *Coppage* v. *Kansas* (1915), 236 U. S. 1; *Truax* v. *Raich* (1915), 239 U. S. 33; but see also *Adams* v. *Tanner* (1917), 224 U. S. 590.) Of anti-trust laws, it has sustained 11 challenged under the Fourteenth Amendment, and 1 under the Commerce Clause, and has held laws invalid in 5 cases. Of gambling laws, it has sustained 7; of legislation relating to liquor and cigarettes, it has sustained 20 challenged under the Fourteenth Amendment, and 12 under the Commerce Clause, and has held 9 invalid. Of game laws, it has sustained 2; of legislation as to cattle quarantine, etc., it has sustained 6 laws challenged under the Fourteenth Amendment, and 7 under the Commerce Clause. Of legislation restricting or regulating the freedom of contract and liberties of individuals, it has sustained 60 laws and held only 3 invalid. Of legislation relative to negroes, it has upheld 13 laws challenged under the Fourteenth Amendment and 2 under the Commerce Clause, and has held invalid 3. Of acts of general legislation, and establishing public improvements, it has upheld 72 and found invalid 7. Of acts of political or municipal legislation, it has upheld 12. Of laws as to navigation, marine liability and liens, pilots, harbor, regulation of immigrants (other than tax cases) challenged under the Fourteenth Amendment, it has upheld 11 and held invalid 2. All the other cases arising under the police power in which State statutes were challenged under the Fourteenth Amendment, or under the Commerce Clause involved regulation of rates of railroad, telegraph, insurance, banking, telephone, grain elevator, or other corporations; they amounted to about 206 in number, of which 32 were held invalid under the Fourteenth Amendment and 24 under the Commerce Clause.

[1] *Social Reform and the Constitution* (1911), by Frank J. Goodnow, 334 *et seq.*; *Social Legislation and the Courts*, by William F. Dodd, *Pol. Sci. Qu.* (1915), XXVII.

As to Judicial Recall, see Theodore Roosevelt in *Outlook*, Jan. 6, 1912; *Majority Rule and the Judiciary* (1912), by William A. Ransom; *Our Judicial Oligarchy* (1912), by Gilbert E. Roe; *The Judicial Recall*, by Rome G. Brown, *Sen. Doc. 892, 62d Cong., 2d Sess.* (1912); *Judicial Recall*, by Rome G. Brown, *Sen. Doc. 617, 63d Cong., 2d Sess.* (1914); *Social Justice and the Courts*, by Theodore Schroeder, *Yale Law Journ.* (1912), XXII; *Report of the Committee on Judicial Recalls, Amer. Bar Ass. Rep.* (1913); *Recall of Judges and Judicial Independence*, by James M. Kerr, *Amer. Law Rev.* (1916), L.

made a wrong decision as to two State statutes — the New York bakers' ten-hour law and the Kansas labor-union law — and as to two Federal statutes — the law forbidding interstate carriers to discriminate against union-labor, and the child-labor law (both enacted ostensibly under the Commerce Clause).[1] When serious error can be claimed in only four cases out of 564 involving the police power of the States and out of the multitude involving the power of Congress acting under the Commerce Clause, it would seem that the evil complained of was practically non-existent. Certainly no other branch of Government, and no other human institution, ever functioned with a slighter percentage of error.

The doctrine which the Court has finally worked out in deciding these constitutional cases may be summed up briefly as the recognition of "the paramount right of public necessity." When, in the last decade of the nineteenth century, it took the radical step of expanding the old classic phrase defining the objects of the exercise of the police power — "public health, safety and morals" — by interpolating the words "public welfare", it advanced far towards acceptance of the theory of modern sociological jurists that the law must recognize the priority of social interests, and that it must start from the premise that "individual interests are to be secured by law, because and to the

[1] *Adair* v. *United States* (1908), 208 U. S. 161, and *Hammer* v. *Dagenhart* (1918), 247 U. S. 251. It should be noted that the chief other decision which has been the subject of attack by labor men was not rendered in construing any statute or passing upon the validity of any statute but was merely a decision as to the limits of the common law rights of laborers to combine — *Hitchman Coal & Coke Co.* v. *Mitchell* (1918), 245 U. S. 229, decided in 1918; see *Collective Bargaining before the Supreme Court*, by Thomas R. Powell, *Pol. Sci. Qu.* (1918), XXXIII; *The Attitude of American Courts towards Restrictive Labor Laws*, by Henry R. Seager, *ibid.* (1904), XIX. One further decision which has been attacked by labor men very recently may be noted, *Truax* v. *Corrigan* (1921), 42 Sup. Ct. 124, holding an Arizona picketing law invalid; see *Yale Law Journ.* (1922), XXXI, 408; *New Republic*, Jan. 25, 1922.

extent that they are social interests." [1] Such a theory is closely approximated in the formula which the Court has adopted, in testing the validity of legislation purporting to be enacted in the exercise of the State police power. This formula appears now to be as follows: that a law purporting to be enacted for the protection of the public will not be declared invalid, unless it shall be made clear to the Court that it was not open to the State Legislature to find that it had a real or substantial relation to the protection of the public health, safety, morals or welfare, or unless it is so clearly arbitrary or oppressive, or (as Judge Holmes has said) "so unreasonable and so far beyond the necessities of the case as to be deemed a purely arbitrary interference with lawful business transactions." [2]

Such being its rule of decision, and the practical administration of the rule being carried out as disclosed in the summary of cases given above, it is clearly

[1] *Judicial Construction of the Fourteenth Amendment*, by Francis J. Swayze, *Harv. Law Rev.* (1912,) XXVI; *The Evolution of Due Process of Law in Decisions of the United States Supreme Court*, by Francis W. Bird, *Columbia Law Rev.* (1913), XIII; *American Political Ideas* (1920), by Charles F. Merriam, ch. v, "The Courts and Justice", ch. vi, "Responsibility of the Judges to the Democracy", quoting Prof. Roscoe Pound.

Everett V. Abbott in *Justice and the Modern Law* (1913), says that the doctrine reached by the Court is "nothing but the formulation in legal phraseology of that thing which every American so ardently desires, 'a square deal,' and when the Courts adjudge a statute to be unconstitutional as taking property without due process of law or as denying the equal protection of the law, all that they really do is to declare their opinion, in more or less technical phraseology, that somebody is not receiving that square deal to which he is entitled."

[2] *Muller* v. *Oregon* (1908), 208 U. S. 412; *Broadnax* v. *Missouri* (1911), 219 U. S. 285; *Chicago etc. R. R.* v. *McQuire* (1911), 219 U. S. 549; *German Alliance Ins. Co.* v. *Kansas* (1914), 233 U. S. 389. See, however, an attack upon the Court's formula by Albert M. Kales in *New Methods in Due Process Cases, Amer. Pol. Sci. Rev.* (1918), XII.

In an interesting article by Learned Hand (now United States District Judge), on *Due Process of Law and the Eight Hour Day, Harv. Law Rev.* (1908), XXI, it is said: "Only in those cases which are obvious beyond peradventure that the statute was the result either of passion, or of ignorance or folly, can the Court say that it was not due process of law. In this way, the principle may be observed that with the expediency of the statute the Court has no concern, but only with the power of the Legislature."

apparent that the Court, so far from being reactionary or obstructive of the development of modern social legislation, has constituted a strong bulwark of the State police power. "A progressive liberalization is manifest as one looks at the decisions from 1890 to 1910," wrote a distinguished law school Dean. "Something very like sociological interpretation has begun in this country." "One of the notable characteristics of our age is that in science, sociology, economics, psychology, philosophy and religion, the movement is from the abstract to the concrete, from speculation to experience, from logic to life. The fact that our Supreme Court has grasped the deeper meaning of this movement, that it looks through technicalities and logical formulas to facts — to reality — has strengthened it in the confidence of the people, and increased its effectiveness for the work properly belonging to it in our coordinate system of government," said a recent legal writer. And an eminent sociologist has also recently said: "On the whole, the American constitutional system has worked well, in spite of the Dred Scott decision and the *Bakers' Case*. And even bad as some decisions have been, progress has been secure and continuous. . . . It is the State Courts which now stand for a belated individualism, and it is only in a few cases that the Federal Supreme Court has erred seriously in this particular." [1]

[1] *The Courts and Legislation*, by Roscoe Pound, *Amer. Pol. Sci. Rev.* (1913), VIII; *Justice Holmes and the Fourteenth Amendment*, by Fletcher Dobyns, *Illinois Law Rev.* (1918), XIII; *Property and Contract* (1914), by Richard T. Ely, II, 691, 698. *Social Reform and the Constitution* (1911), by Frank J. Goodnow, 329 *et seq.*: "So far from the Supreme Court being open to our criticism for giving unduly narrow construction to constitutional provisions in favor of individual rights, as against measures designed for the public welfare, a more candid criticism might suggest that that great tribunal in common with other Courts, had yielded somewhat unduly to public criticism in giving effect to legislation, which, however desirable from the standpoint of social reform, yet involves a measurable encroachment upon some of those individual rights to secure which the 14th Amendment was adopted." *Certainty and Justice* (1914), by Frederic R. Coudert, 57: "Many

Unquestionably, unbiased application of the formula which the Court has worked out for the determination of the validity of a State statute presents a task of high difficulty. As has been well said: "It calls for minds of extraordinary intellectual disinterestedness and penetration, lest limitation in personal experience be interpreted, however consciously or unconsciously, as constitutional limitations. . . . It requires on the part of a Judge the highest degree of analytic acumen and intellectual honesty, to concede to others that latitude of opinion within the bounds of the rational, which is absolutely necessary before he can rightly decide the highly artificial question which he is now compelled to decide." Or as another writer has recently stated: "Working under the powerful pressure of unscrupulous political and economic interests, in a period of active law-making by the community, and more than all, in a period when the economic, social and class origins and implications of law and justice are scrutinized and challenged as never before, the task of legal logic, of penetrating insight, of balanced judgment, of invention of formulas of democratic justice, is more than commonly heavy." [1]

of the State Courts have been over-conservative and are largely responsible for the feeling that has been created against the judiciary as the representative of capitalisitic and conservative power. But the Supreme Court of the United States, with few exceptions has been liberal, recognizing that readjustment is not necessarily revolution." *Social Legislation and the Courts*, by William F. Dodd, *Pol. Sci. Qu.* (1913), XXVII: "In recent years a number of Courts have shown a distinct liberalizing tendency. . . . Except for a rather unfortunate lapse in the New York bake-shop case, the Supreme Court of the United States has in the main taken a liberal attitude toward legislation aimed to meet new social and industrial needs." See also *The Police Power, a Product of the Rule of Reason*, by George W. Wickersham, *Harv. Law Rev.* (1914), XXVII; *The Changing Attitude of the Courts Toward Social Legislation*, by Louis M. Greeley, *Illinois Law Rev.* (1910), V.

[1] *The Constitutional Opinion of Justice Holmes*, by Felix Frankfurter, *Harv. Law Rev.* (1916), XXIX; *The Constitution and the Courts*, by John G. Palfrey, *ibid.* (1913), XXVI; *American Political Ideas* (1920), by Charles E. Merriam; "Under the constitutional system as developed in this country, the political philosophy of the Judges is a matter of vital importance;" *Social Legislation and the Courts*, by William F. Dodd, *Pol. Sci. Qu.* (1913), XXVIII. "Settled habits of juristic

But the Court has been and can be valuably aided, in cases involving novel State legislation, through a proper performance by the Bar of its special duty. As the decision of the validity of most statutes now depends upon the application of a well established formula to a constantly changing and growing variety of economic and social facts, that decision, whether the legislation in dispute had any "essential and reasonable relation" to the public welfare designed by the Legislature to be promoted, will depend very largely upon the facts adduced by counsel to establish such relation. Since the presentation of the novel brief in *Muller* v. *Oregon*, 208 U. S. 412, by Louis D. Brandeis, in 1908, the Bar has tended increasingly to be of aid to the Courts. "That was the first case presented on the basis of authoritative data. For the first time, the arguments and briefs breathed the air of reality."[1]

One other duty towards the Court and towards the public is owed by counsel which should be unflinchingly performed, namely, to insist that the doctrine of *stare decisis* can never be properly applied to decisions upon constitutional questions. However the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision

thought are characteristic of American legal science. Our legal scholarship is chiefly historical. Our professional thinking upon juristic subjects is almost wholly from the point of view of the 18th Century natural law." *Courts and Legislation*, by Roscoe Pound, *Amer. Pol. Sci. Rev.* (1913), VIII.

[1] *Hours of Labor and Realism in Constitutional Law*, by Felix Frankfurter, *Harv. Law Rev.* (1916), XXIX; *Constitutional Decisions by a Bare Majority of the Court*, by Robert E. Cushman, *Michigan Law Rev.* (1921), XIX; *The Need of Social Statistics as an Aid to the Courts*, by Walter F. Wilcox, *Amer. Law Rev.* (1913), XLVII; *New Methods in Due Process Cases*, by Albert M. Kales, *Amer. Pol. Sci. Rev.* (1918), XII; *Constitutional Limitations and Labor Legislations*, by Ernst Freund, *Illinois Law Rev.* (1910), IV; *Changing Attitude of the Courts towards Social Legislation*, by Louis M. Greeley, *ibid.* (1910), V; *Liberty of Contract*, by Roscoe Pound, *Yale Law Journ.* (1909), XVIII. In the brief of Louis D. Brandeis for defendants in error in *Stettler* v. *O'Hara* on writ of error to the Supreme Court of Oregon, the points of law were stated in three pages, and the evidence to support the contention that the legislative action had a reasonable relation to public health safety or welfare comprised 390 pages.

of the Court. "To the decision of an underlying question of constitutional law no . . . finality attaches. To endure, it must be right." [1] Hence, as has been well said recently: "Any citizen whose liberty or property is at stake has an absolute constitutional right to appear before the Court and challenge its interpretation of the Constitution, no matter how often they have been promulgated, upon the ground that they are repugnant to its provisions. . . . When the Bar of the country understands this, and respectfully but inexorably requires of the Supreme Court that it shall continually justify its decisions by the Constitution, and not by its own precedents, we shall gain a new conception of the power of our constitutional guaranties. . . . What we need is constant and unrelenting professional criticism of judicial opinions, and constant unrelenting insistence that judicial errors of reasoning shall be judicially corrected." [2] Such insistence does not imply that "the Constitution must be bent from its original meaning to suit present exigencies." To attribute such a power to the Judiciary would be intolerable; but it is of the highest importance that the Judiciary should always be pervious to demonstration of judicial error as to the original meaning of the Constitution, and prepared to correct its own mistakes.[3]

Besides the increased importance of the function of counsel in these constitutional cases in modern days,

[1] *Works of George Bancroft* (1852), IV, 549.

[2] *Justice and the Modern Law* (1913), by Everett V. Abbott.

[3] *The Elasticity of the Constitution*, by Arthur W. Machen, Jr., *Harv. Law Rev.* (1901), XIV; *The Doctrine of Stare Decisis as Applied to Constitutional Questions*, by D. H. Chamberlain, *Harv. Law Rev.* (1890), III; *The Doctrine of Stare Decisis*, by Edward B. Whitney, *Michigan Law Rev.* (1904), III; *Judge-Made Constitutional Law*, by Munroe Smith, *Van Norden's Mag.* (1909); *Congress and the Supreme Court*, by H. M. Bowman, *Pol. Sci. Qu.* (1910), XXV; *Stare Decisis and the Fourteenth Amendment*, by Charles W. Collins, *Columbia Law Rev.* (1912), XII; *Some Constitutional Limitations on the Judiciary*, by T. L. Edelen, *Amer. Law Rev.* (1914), XLVIII.

one other factor has tended to keep the Court responsive to the necessity of preserving the police power intact. This factor is the increasing recognition by the Judges themselves of their duty to keep in touch with the progressive economic, social and philosophical ideals of the day. As Roscoe Pound has said: "In periods in which the law is formative or growing . . . it is of great consequence that juristic and judicial thinking be in touch with the best lay thought of the time." [1] Louis D. Brandeis said (shortly before his appointment on the Court): "In the last century, our democracy has deepened. Coincidentally, there has been a shifting of our longing from legal justice to social justice. . . . What we need is not to displace the Courts but to make them efficient instruments of justice; not to displace the lawyer but to fit him for his official or judicial task . . . by broader education, by study undertaken preparatory to practice and continued by lawyer and Judge throughout life: study of economics and sociology and politics which embody the facts and present the problems of today." Whatever may be said of State Court Judges, those of the United States Supreme Court have been thoroughly and increasingly alive to the necessity of intellectual contact with new conditions and theories; and an earlier criticism of the Judiciary that cases are decided "upon the principles of the past . . . and the prejudices which the individualism of common law institutional writers, the dogmas learned in a college course in economics, and habitual association with the business and professional class must inevitably produce" is now by no means justified.[2]

[1] *Note* on *The New Philosophies of the Law*, by Roscoe Pound, *Harv. Law Rev.* (1914), XXVII, 733.

[2] *Common Law and Legislation*, by Roscoe Pound, *Harv. Law Rev.* (1908), XXI; *The Living Law*, by Louis D. Brandeis, *Illinois Law Rev.* (1916), X; see also *The Law and the Facts*, by Woodrow Wilson, *Amer. Pol. Sci. Rev.* (1911), V.

So thoroughly have the Judges, with very few exceptions, been imbued with this liberal spirit in later years, that the danger at present does not seem to lie in a reluctance of the Court to bow to the Legislative will, but rather in a too facile readiness to confirm whatever the Legislature may have temporarily chosen to decree. There is some truth in Judge Dillon's words uttered as early as 1895: "If we are not struck with judicial blindness, we cannot fail to see that what is now to be feared and guarded against is the despotism of the many — of the majority." [1] Restrictions of a temporary majority are as necessary now, as they were deemed to be when the founders of the Constitution deliberately and wisely included them in the frame of our Government. "The rights embodied in the Constitution . . . are as essential to the protection of the citizen against the tyranny of a hydra-headed tyrant of the future as they were against the monarchs of the past," said Attorney-General Wickersham at the meeting of the Bar on the death of Chief Justice Fuller. It is the chief and increasingly important function of the American Judiciary to disprove the prediction of that English historian, who wrote that "there is, in opposition to the will or passions of the majority, no lasting security, either for life or property, in America, in cases where the public mind is vehemently excited", and to confirm the happy phrase of James Russell Lowell that our written Constitutions are an obstacle "to the whim, but not to the will of the people." [2] Legislative action is not always the height or essence of wisdom and

[1] *The Police Power — a Product of the Rule of Reason*, by George W. Wickersham, *Harv. Law Rev.* (1914), XXVII; *The Decline of Personal Liberty in America*, by Edgar M. Cullen, *Amer. Law Rev.* (1914), XLVIII. *Recent Extensions of the State Police Power*, by George W. Wickersham, *ibid.* (1920), LIV; *The Laws and Jurisprudence of England and America* (1895), by John F. Dillon, 204–205.

[2] *History of Europe* (1839–1842), by Archibald Alison; *Certainty and Justice* (1914), by Frederic R. Coudert, 56–57, 89.

justice. The needs or desires of the public are not always to be gratified, at the expense of individual rights and liberties; nor has the American people reached a stage where it is willing to surrender all such rights and liberties. There are still cases where "more is to be got for human happiness by private energy than by public legislation." It is of the greatest importance that the Judiciary should protect the rights of the minority, for otherwise they have no rights. In fact, the true test of a free government is the degree to which such protection is afforded. The majority must, of course, prevail in the long run, and eventually a Court must harmonize its juristic conceptions with the conception of liberty and right which public opinion sustains; but a majority is not always right temporarily.[1] In view of the tendencies of legislation at the present time, the following views of a recent writer deserve earnest thought: "There has been some tendency in recent times to ignore the facts of majority tyranny, and to attribute the constitutional restraints adopted by the Fathers to certain monarchistic tendencies and an antipathy to the principles of democracy. But a careful study of the period would seem to indicate that the Fathers were animated mainly by a sane and practical fear of the evils of majority tyranny, with which they had considerable experience. The Revolutionary State Constitutions, with their provisions for legislative omnipotence, gave ample opportunities for the demonstration of the evils of unrestrained majorities. . . . The real importance of preventing majority tyranny does not become apparent, however, until we examine it in the light of its effect upon the existence of a true

[1] *Popular Government* (1885), by Sir Henry Maine, 52; *Liberty of Contract, under the Police Power*, by Frederic N. Judson, *Amer. Law Rev.* (1891), XXV; but see *contra, Common Law and Legislation*, by Roscoe Pound, *Harv. Law Rev.* (1908). XXI.

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public opinion as a basis of popular government. We have seen that we cannot have true public opinion unless the minority feel themselves bound to acquiesce in the opinion of the majority. This attitude will never exist in regard to majority action which is tyrannical in nature, and which runs counter to the deeply embedded prejudices and convictions of the minority. In order to safeguard the very existence of popular government, therefore, it has been necessary to erect constitutional safeguards to protect the minority from such action by the majority as would lead the former to resistance or revolt." [1] Moreover, as Burke said, one hundred and thirty years ago: "The restraints on men, as well as their liberties, are to be reckoned among their rights." [2]

That the Court, in its one hundred and thirty years' existence, has fully and worthily fulfilled the purposes for which it was designed by the framers of the Constitution, there can be no doubt; and De Tocqueville's words, written in 1835, are as true today as then: "The Supreme Court is placed at the head of all known tribunals, both by the nature of its rights and the class of justiciable parties which it controls. The peace, the prosperity and the very existence of the Union are placed in the hands of the Judges. Without their active coöperation, the Constitution would be a dead letter; the Executive appeals to them for protection against the encroachment of the Legislative power; the Legislature demands their protection against the

[1] *Popular Government* (1921), by Arnold Bennett Hall, 154, 156; see also views of Viscount Bryce in his *Modern Democracies* (1921). See also *Debates in the Federal Convention of 1787* (ed. by Gaillard Hunt and James Brown Scott, 1920), 389, speech of George Mason, stating that the chief of the evils of the republican form of government " were the danger of the majority oppressing the minority, and the mischievous influence of demagogues."

[2] *Reflections on the Revolution in France, Works of Edmund Burke*, III.

designs of the Executive; they defend the Union against the disobedience of the States; the States, from the exaggerated claims of the Union; the public interests against the interests of private citizens; and the conservative spirit of order against the innovations of an excited democracy." And as Judge Field wrote, on his resignation in 1897: "As I look back over the more than a third of a century that I have sat on this Bench, I am more and more impressed with the immeasurable importance of this Court. Now and then we hear it spoken of as an aristocratic feature of a republican government. But it is the most democratic of all. Senators represent their States, and Representatives their constituents; but this Court stands for the whole country, and as such it is truly 'of the people, by the people and for the people.' It has, indeed, no power to legislate. It cannot appropriate a dollar of money. It carries neither the purse nor the sword. But it possesses the power of declaring the law, and in that is found the safeguard which keeps the whole mighty fabric of government from rushing to destruction. This negative power, the power of resistance, is the only safety of a popular government."

That the Court is not infallible, that like all other human institutions it makes its mistakes may be acknowledged; yet in spite of the few instances in which it has run counter to the deliberate and better judgment of the community, the American people will unquestionably conclude that final judgment as to their constitutional rights is safer in the hands of the Judiciary than in those of the Legislature, and that if either body is to possess uncontrolled omnipotence, it should be reposed in the Court rather than in Congress, and in independent Judges rather than in Judges dependent on election by the people in passionate

party campaigns and on partisan political issues. In the words of Attorney-General Wickersham: "Mistakes have been made by the Judiciary. Cases have been wrongly decided and the extension of legal principles to meet new conditions and judicial interpretation of the Constitution has often been slower than impatient reformers desirous of immediate results would wish. Yet no candid critic can say that on the whole the history of the American Judiciary does not furnish as high, if not higher, example of adequate results than that of any other branch of the Government." "They have no patronage with which to reward their followers, and no partisans to sustain them right or wrong; they have no interest except in common with their countrymen, and no ambition except to leave behind them an honored name. Of all men in this world, they have the least temptation to do wrong and the greatest incentive to do right. They are not infallible, and they make their mistakes, but they make fewer mistakes than other men; and so long as they can guard the Constitution of this Republic, it will protect the lives, the liberty and the property of the American people." [1]

This book may well close with the eloquent appeal (quoted in the Introductory Chapter), written in 1856 at a time when American institutions seemed shaken: "Admit that the Federal Judiciary may in its time have been guilty of errors, that it has occasionally sought to wield more power than was safe, that it is as fallible as every other human institution. Yet it has

[1] *The Judicial Function*, by George W. Wickersham, *U. of P. Law Rev.* (1912), LX; *The American Judiciary*, by Joseph W. Bailey, *Amer. Bar Ass. Report* (1915); *The Supreme Court and its Constitutional Duty and Power*, by Junius Parker, *Amer. Law Rev.* (1896), XXX; "In times of political upheaval, of sectional animosity, of communistic uprising, the nine quiet men who spend their lives away from the political field, free from the necessity of demagoguery, constitute the very sheet-anchor of the institutions of our land."

been and is, a vast agency for good; it has averted many a storm which threatened our peace, and has lent its powerful aid in uniting us together in the bonds of law and justice. Its very existence has proved a beacon of safety . . . and now let us ask ourselves, with all its imagined faults, what is there that can replace it? Strip it of its power, and what shall we get in exchange? Discord and confusion, statutes without obedience, Courts without authority, an anarchy of principles and a chaos of decision, till all law at last shall be extinguished by an appeal to arms." "If the Judiciary be struck from the system," said William Wirt in 1832, "what is there of any value that will remain? The Government cannot subsist without it. It would be as rational to talk of a solar system without a sun. No, sir, the people of the United States know the value of this institution too well to suffer it to be put down or trammelled in its action by the dictates of others." [1]

[1] *Amer. Law Reg.* (1856), IV, 129; *Wirt*, II, 338–339, argument of Wirt in *Cherokee Nation* v. *Georgia* (1831), 5 Pet. 1. Judge Henry B. Brown, on his retirement, wrote to his Associates on the Court, May 28, 1906: "The antagonisms, sometimes almost fierce, which were developed during the earliest decades of its history and at one time threatened to impair its usefulness, are happily forgotten; and the now universal acquiescence in its decisions, though sometimes reached by a bare majority of its members, is a magnificent tribute to that respect for the law inherent in the Anglo-Saxon race, and contains within itself the strongest assurance of the stability of our institution." 202 U. S.

APPENDIX

LIST OF PERSONS NOMINATED AS CHIEF JUSTICE AND AS ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, 1789–1921

[The dates of final appointment and nomination to the Senate and the figures as to the votes are taken from the official *Executive Journals of the Senate*, until 1901. The dates, after 1901, are from the *Congressional Record*. The order is as follows: date of birth; date of appointment or nomination (the date of receipt of nomination by the Senate, when differing from the date of appointment, being inserted in parentheses); date of confirmation by the Senate; date of rejection; date of final postponement of consideration; date of withdrawal of the nomination; date of declination of office after confirmation.]

John Jay (Chief Justice), born, Dec. 12, 1745; appointed, Sept. 24, 1789; confirmed, Sept. 26, 1789.

John Rutledge, born, — — 1739; appointed, Sept. 24, 1789; confirmed, Sept. 26, 1789; resigned, March 5, 1791.

William Cushing, born, March 1, 1732; appointed, Sept. 24, 1789; confirmed, Sept. 26, 1789.

Robert Hanson Harrison, born, — — 1745; appointed, Sept. 24, 1789; confirmed, Sept. 26, 1789.

James Wilson, born, Sept. 14, 1742; appointed, Sept. 24, 1789; confirmed, Sept. 26, 1789.

John Blair, born, — — 1732; appointed, Sept. 24, 1789; confirmed, Sept. 26, 1789.

James Iredell, born, Oct. 5, 1751; appointed, Feb. 9, 1790; confirmed, Feb. 10, 1790.

Thomas Johnson, born, Nov. 4, 1732; appointed, Aug. 5, 1791, Oct. 31, 1791 (Nov. 1, 1791); confirmed, Nov. 7, 1791.

William Paterson, born, — — 1745; appointed, Feb. 27, 1793; withdrawn, Feb. 28, 1793.

William Paterson, appointed, March 4, 1793; confirmed, March 4, 1793.

John Rutledge (Chief Justice), born, — — 1739; appointed, July 1, 1795 (Nov. 5, 1795); rejected, Dec. 15, 1795 (10–14).

William Cushing (Chief Justice), born, March 1, 1732; appointed, Jan. 26, 1796; confirmed, Jan. 27, 1796; declined, Feb. 2, 1796.

Samuel Chase, born, April 17, 1741; appointed, Jan. 26, 1796; confirmed, Jan. 27, 1796.

Oliver Ellsworth (Chief Justice), born, April 29, 1745; appointed, March 3, 1796; confirmed, March 4, 1796 (21–1).

Bushrod Washington, born, June 5, 1762; appointed, Sept. 29, 1798 (Dec. 19, 1798); confirmed, Dec. 20, 1798.

Alfred Moore, born, May 21, 1755; appointed, Oct. 20, 1799 (Dec. 6, 1799); confirmed, Dec. 10, 1799.

John Jay (Chief Justice), born, Dec. 12, 1745; appointed, Dec. 18, 1800; confirmed, Dec. 19, 1800; declined, Jan. 2, 1801.

John Marshall (Chief Justice), born, Sept. 24, 1755; appointed, Jan. 20, 1801; confirmed, Jan. 27, 1801.

William Johnson, born, Dec. 27, 1771; appointed, March 22, 1804; confirmed, March 24, 1804.

Henry Brockholst Livingston, born, Nov. 26, 1757; appointed, Nov. 10, 1806, Dec. 13, 1806 (Dec. 15, 1806); confirmed, Dec. 17, 1807.

Thomas Todd, born, Jan. 23, 1765; appointed, Feb. 28, 1807; confirmed, March 3, 1807.

Levi Lincoln, born, May 15, 1749; appointed, Jan. 2, 1811; confirmed, Jan. 3, 1811.

Alexander Wolcott, born, Nov. 12, 1775; appointed, Feb. 4, 1811; rejected, Feb. 13, 1811 (9–24).

John Quincy Adams, born, July 11, 1767; appointed, Feb. 21, 1811; confirmed, Feb. 22, 1811; declined, April, 1811.

Joseph Story, born, Sept. 18, 1779; appointed, Nov. 15, 1811; confirmed, Nov. 18, 1811.

Gabriel Duval, born, Dec. 6, 1752; appointed, Nov. 15, 1811; confirmed, Nov. 18, 1811.

Smith Thompson, born, Jan. 17, 1768; appointed, Sept. 11, 1823 (Dec. 8, 1823); confirmed, Dec. 19, 1823.

Robert Trimble, born, — — 1777; appointed, April 11, 1826; confirmed, May 9, 1826 (27–5).

John Jordan Crittenden, born, Sept. 10, 1787; appointed, Dec. 17, 1828 (Dec. 18, 1828); postponed, Feb. 12, 1829 (27–17).

John McLean, born, March 11, 1785; appointed, March 6, 1829; confirmed, March 7, 1829.

Henry Baldwin, born, Jan. 14, 1780; appointed, Jan. 4, 1830 (Jan. 5, 1830); confirmed, Jan. 6, 1830 (41–2).

James Moore Wayne, born, — — 1790; appointed, Jan. 7, 1835; confirmed, Jan. 9, 1835.

Roger Brooke Taney, born, March 17, 1777; appointed, Jan. 15, 1835; postponed March 3, 1835 (24–21).

Roger Brooke Taney (Chief Justice), born, March 17, 1777; appointed, Dec. 28, 1835; confirmed, March 15, 1836 (29–15).

Philip Pendleton Barbour, born, May 25, 1783; appointed, Dec. 28, 1835; confirmed, March 15, 1836 (30–11).

William Smith, born, — — 1762; appointed, March 3, 1837; confirmed, March 8, 1837; declined, March, 1837.

John Catron, born, — — 1786; appointed, March 3, 1837; confirmed, March 8, 1837.

John McKinley, born, May 1, 1780; appointed April 22, 1837 (Sept. 18, 1837); confirmed, Sept. 25, 1837.

Peter Vivian Daniel, born, April 24, 1784; appointed, Feb. 26, 1841 (Feb. 27, 1841); confirmed, March 2, 1841 (22–5).

John Canfield Spencer, born, Jan. 8, 1788; appointed, Jan. 8, 1844 (Jan. 9, 1844); rejected, Jan. 31, 1844 (21–26).

Reuben Hyde Walworth, born, Oct. 26, 1788; appointed, March 13, 1844; postponed, Jan. 15, 1844 (27–20); withdrawn, June 17, 1844.

Edward King, born, Jan. 31, 1794; appointed, June 5, 1844; postponed, June 15, 1844 (29–18).

Edward King, appointed, Dec. 4, 1844; postponed, Jan. 23, 1845; withdrawn, Feb. 7, 1845.

Samuel Nelson, born, Nov. 10, 1792; appointed, Feb. 4, 1845 (Feb. 6, 1845); confirmed, Feb. 14, 1845.

John Meredith Read, born, July 21, 1797; appointed, Feb. 7, 1845 (Feb. 8, 1845); not acted upon.

George Washington Woodward, born, March 26, 1809; appointed, Dec. 23, 1845; rejected, Jan. 22, 1846 (20–29).

Levi Woodbury, born, Dec. 22, 1789; appointed, Sept. 20, 1845 (Dec. 23, 1845); confirmed, Jan. 3, 1846.

Robert Cooper Grier, born, March 5, 1794; appointed, Aug. 3, 1846; confirmed, Aug. 4, 1846.

Benjamin Robbins Curtis, born, Nov. 4, 1809; appointed, Sept. 22, 1851 (Dec. 11, 1851); Dec. 29, 1851.

Edward A. Bradford, born, Sept. 27, 1813; appointed, Aug. 16, 1852; not acted upon.

George Edmund Badger, born, April 17, 1795; appointed, Jan. 10, 1853; postponed, Feb. 11, 1853 (26–25).

William C. Micou, born, — — 1806; appointed, Feb. 24, 1853; not acted upon.

John Archibald Campbell, born, June 24, 1811; appointed, March 21, 1853; confirmed, March 25, 1853.

Nathan Clifford, born, Aug. 18, 1803; appointed, Dec. 9, 1857; confirmed, Jan. 12, 1858 (26–23).

Jeremiah Sullivan Black, born, Jan. 10, 1810; appointed, Feb. 5, 1861 (Feb. 6, 1861); rejected, Feb. 21, 1861 (25–26).

Noah Haynes Swayne, born, Dec. 7, 1804; appointed, Jan. 21, 1862 (Jan. 22, 1862); confirmed, Jan. 24, 1862 (38–1).

Samuel Freeman Miller, born, April 7, 1816; appointed, July 16, 1862; confirmed, July 16, 1862.

David Davis, born, March 9, 1815; appointed, Oct. 17, 1862 (Dec. 1, 1802); confirmed, Dec. 8, 1862.

Stephen Johnson Field, born, Nov. 4, 1816; appointed, March 6, 1863 (March 7, 1863); confirmed, March 10, 1863.

Salmon Portland Chase (Chief Justice), born, Jan. 13, 1808; appointed, Dec. 6, 1864; confirmed, Dec. 6, 1864.

Henry Stanbery, born, Feb. 20, 1803; appointed, April 16, 1866; not acted upon.

Ebenezer Rockwood Hoar, born, Feb. 21, 1816; appointed, Dec. 14 (Dec. 15), 1869; rejected, Feb. 3, 1870 (24–33).

Edwin McMasters Stanton, born, Dec. 19, 1815; appointed, Dec. 20, 1869; confirmed, Dec. 20, 1869 (46–11).

William Strong, born, March 6, 1808; appointed, Feb. 7, 1870 (Feb. 8, 1870); confirmed, Feb. 18, 1870.

Joseph P. Bradley, born, March 14, 1813; appointed, Feb. 7, 1870 (Feb. 8, 1870); confirmed, March 21, 1870 (46–9).

Ward Hunt, born, June 14, 1810; appointed, Dec. 3, 1872 (Dec. 6, 1872); confirmed, Dec. 11, 1872.

George Henry Williams (Chief Justice), born, March 23, 1823; appointed, Dec. 1, 1873 (Dec. 2, 1873); withdrawn, Jan. 8, 1874.

Caleb Cushing (Chief Justice), born, Jan. 17, 1800; appointed, Jan. 9, 1874; withdrawn, Jan. 13, 1874.

Morrison Remick Waite (Chief Justice), born, Nov. 29, 1816; appointed, Jan. 19, 1874; confirmed, Jan. 21, 1874 (63–6).

John Marshall Harlan, born, June 1, 1833; appointed, March 29, 1877 (Oct. 17, 1877); confirmed, Nov. 29, 1877.

William Burnham Woods, born, Aug. 3, 1824; appointed, Dec. 15, 1880; confirmed, Dec. 21, 1880 (39–8).

Stanley Matthews, born, July 21, 1824; appointed, Jan. 26, 1881; not acted upon.

Stanley Matthews, appointed, March 14, 1881 (March 18, 1881); confirmed, May 12, 1881 (24–23).

Horace Gray, born, March 24, 1828; appointed, Dec. 19, 1881; confirmed, Dec. 20, 1881 (51–5).

Roscoe Conkling, born, Oct. 30, 1829; appointed, Feb. 24, 1882; confirmed, March 2, 1882 (39–12); declined, March, 1882.

Samuel Blatchford, born, March 9, 1820; appointed, March 13, 1882; confirmed, March 27, 1882.

Lucius Quintus Cincinnatus Lamar, born, Sept. 17, 1825; appointed, Dec. 6, 1887 (Dec. 12, 1887); confirmed, Jan. 16, 1888 (32–28).

Melville Weston Fuller (Chief Justice); born, Feb. 11, 1833; appointed, April 30, 1888 (May 2, 1888); confirmed, July 20, 1888 (41–20).

David Josiah Brewer, born, Jan. 20, 1837; appointed, Dec. 4, 1889; confirmed, Dec. 18, 1889 (53–11).

Henry Billings Brown, born, March 21, 1836; appointed, Dec. 23, 1890; confirmed, Dec. 29, 1890.

George Shiras, Jr., born, Jan. 26, 1832; appointed, July 19, 1892; confirmed, July 26, 1892.

Howell Edmunds Jackson, born, April 8, 1832; appointed, Feb. 2, 1893; confirmed, Feb. 18, 1893.

William Butler Hornblower, born, May 13, 1851; appointed, Sept. 19, 1893; rejected, Jan. 15, 1894 (24–30).

Wheeler Hazard Peckham, born, Jan. 1, 1833; appointed, Jan. 22, 1894; rejected, Feb. 16, 1894 (32–41).

Edward Douglass White, born, Nov. 3, 1845; appointed, Feb. 19, 1894; confirmed, Feb. 19, 1894.

Rufus Wheeler Peckham, born, Nov. 8, 1838; appointed, Dec. 3, 1895; confirmed, Dec. 9, 1895.

Joseph McKenna, born, Aug. 10, 1843; appointed, Dec. 16, 1897; confirmed, Jan. 21, 1898.

Oliver Wendell Holmes, born, March 8, 1841; appointed, August 11, 1902 (Dec. 2, 1902); confirmed, Dec. 4, 1902.

William Rufus Day, born, April 17, 1849; appointed, Feb. 19, 1903; confirmed, Feb. 23, 1903.

William Henry Moody, born, Dec. 23, 1853; appointed, Dec. 3, 1906; confirmed, Dec. 12, 1906.

Horace Harmon Lurton, born, Feb. 26, 1844; appointed, Dec. 13, 1909; confirmed, Dec. 20, 1909.

Edward Douglass White (Chief Justice), born, Nov. 3, 1845; appointed, Dec. 12, 1910; confirmed, Dec. 12, 1910.

Charles Evans Hughes, born, April 11, 1862; appointed, April 25, 1910; confirmed, May 2, 1910.

Willis VanDevanter, born, April 17, 1859; appointed, Dec. 12, 1910; confirmed, Dec. 15, 1910.

Joseph Rucker Lamar, born, Oct. 14, 1857; appointed, Dec. 12, 1910; confirmed, Dec. 15, 1910.

Mahlon Pitney, born, Feb. 5, 1858; appointed, Feb. 19, 1912; confirmed, March 13, 1912.

James Clark McReynolds, born, Feb. 3, 1862; appointed, Aug. 19, 1914; confirmed, Aug. 29, 1914.

Louis Dembitz Brandeis, born, Nov. 13, 1856; appointed, Jan. 28, 1916; confirmed, June 1, 1916.

John Hessin Clarke, born, Sept. 15, 1857; appointed, July 14, 1916; confirmed, July 24, 1916.

William Howard Taft (Chief Justice), born, Sept. 15, 1857; appointed, June 30, 1921; confirmed, June 30, 1921.

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